THE

## SPIRIT

OF THE

## BANKRUPT LAWS.

Originally compiled by .

## EDWARD GREEN, Efq. formerly a Commillioner.

Wherein are principally confidered, the

- 1. Declaring the party Bank-
- 2. Seizing his Estate, and summoning him to surrender.
- 3. Receiving Proof of the Debts of his Creditors.
- 4. Appointing, chusing, and re-
- 5. Selling and conveying the E-
- The examining and committing the Bankropt, his Wife, and others.
- 7. Certifying his Conformity.
- 8. Dividing the Estate.
- 9. Ordering Bankrupt his Allowance, and Overplus.

Which are fully explained and discussed, with the Authority and Power of the Commissioners to commit, from the Determinations of Lords Hardwicke, Manifield, and of the present Judges.

ALSO

PRECEDENTS, INSTRUCTIONS, and a copious INDEX.

The THIRD EDITION, corrected, improved, and enlarged,
By a late Commissioner.

### LONDON

Printed for J. WILLIAMS, at No. 39, next the Mitre Tavern, Fleet-street. 1776.

[Price bound Five Shillings.]

### TO THE

## READER.

missioner (a) at law, and combis reading on (c) one of the bankrupts, famous for this reading on (c) one of the bankrupt starutes, informs (d) us, "that our fore-ancefuces, many (e) years ago, so favoured merichants, that for their benefit a law was made of purpose, called Statutum (f) de Mercatoribus; so as where at common law, if a debt were owing to a man, he could not by law recover this debt without process and pleading the first start without man's land were liable or a man, the could man's land were liable or a man, they man's land were liable or a man to that law (if once as a man and and all and they are start and and seed that law (if once as a man and and all and they are start and they are start and all and they are start and all and they are start and all all and they are start and and they ar

(a) He was called to this state and degree, 19 May, 1640. 16 Car. 1. Dugd, Chron. Ser. 3.

(b) Geodinge's preface to his Law against Bankrupts.

(6) Goodinge's pretace to his Law against hankrupis

(d) In his " Grano Lesteris" 2, 3-.

re) Near five handred, viz. A. D. 128 3.

(6) 13 Edw. Bat. 3. C. 1.

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### TO THE

## READER.

STONE, a serjeant (a) at law, and commissioner (b) of bankrupts, famous for his reading on (c) one of the bankrupt statutes, informs (d) us, "that our fore-ancest tors, many (e) years ago, so savoured merchants, that for their benefit a law was made of purpose, called Statutum (f) de Mercatoribus; so as where at common law, if a debt were owing to a man, he could not by law recover this debt without process and pleading, and yet then no man's land were liable to judgment; by that law (if once a man acknowledged

(b) Goodinge's preface to his Law against Bankrupts.

(e) Stat 13 Eliz. c. 7.

(d) In his " Oratio Legoris," 2, 3.

(e) Near five hundred, viz. A. D. 1283.

(1) 13 Edw. fat. 3. c. 1.

<sup>(</sup>a) He was called to this flate and degree, 19 May, 1640. 16 Car. 1. Dugd. Chron. Ser. 3.

To the READER the READER. 's himself to be indebted to a merchant, and is paid not his money casthis day, without 1's processo without pleading imithdure fur Bether fuit or judgment the merchant should hame present execution against his debtor " both for body goods, and lands 3d saw " or 5 w In those days few Englishmen were mer-% chants, but frangers brought their com modities bither, and fetched ours 30 but that course was then clean altered, for very few came from foreign nations to us, but " we ourselves traded and trafficked with all 4 parts of the babitable world, christendom, or heatherish, and into many parts not inbabited by any buman creature; as the number ber of merchants had increased fo had b their cunning and crafty dealings, informach " it fell out, that we had more need to make laws against them, than for them; for it was " found to be a matter of more difficulty " for men to get their debts of merchants, "othan it was in times past for merchants to 's gerwthein debts of other men, for fed vel different view to afficeled and suditom silaming Mr. ferjeant (b) Goodinge, another writer on the bankrupe laws, had toften wondered. " that so little had been wrote on a subject sowhich made for great a figure amongst men stof bufinels tas well as Westminster ball as

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<sup>(</sup>a) Macrobius, 2 Mod. 16147 27 Inft: 1602 vul (a)

" upon the Royal Exchange;" he further. adds, in that the concerns of bankrupts, which were theretofore almost who hy ma" Gunageth within the precincts of our capital siring on famous marts; were then descended cointo country cowns and villages forthat it " was become a matter of public and almost "univerfal confideration." stiff thefer were the fentiments of a lawyer in the beginning of thei century, what would they have been, that courie was rifemir side or rbey don't bad The Carrical advice given the Roman people, diby beharmincomparable poer Juounal, frems for extremely applicable to a great part of mankind, authis day engaged in commercial affairs, that we cannot refrain inferring ibin this placen it is contained in those famous lines in his first fatire, so universally and fo justly admired by the learned world? 11 "

Aude (a) aliquid bremibus Gyaris, & Carcere digaumSi vis effe aliquis: PROBITAS laudatur, & alget.

of Wer offer you's treatife on the bankrupt laws upon amentire new plan, and with a different view to any hitherto published on the fubject view. 'Starbarity and powers of the commissioners under 'Bathasity and powers of the commissioners under that to hat to be be the commissioners and the commissioners are considered to the commissioners and commissioners are considered to the commissioners are considered to the commissioners and commissioners are considered to the commissioners and commissioners are considered to the commissioners are considered to the commissioners and commissioners are considered to the commissioners are co

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mirked dated died chancellor, dord Mansfeld, regions adride Consultation (de identition de edit Judges, anythe most important and unfertled primes in wher bankruipe daws, as also from the wwings of approved (a) authors who have acquirately graithfully and judicioully asor putting out the eye, wouldedubbshroce leitestant all ebettel die wish washing Wille preambles to the statutes concerning bankrupts, in deference to Sir Edward Coke, who affures (b) aisy as than the rehearfal conspressor Hobbesof a flature is a fgood means 150 find 5th dutits meaning, and as it were a key to "copen the understanding thereof," vllergye of Lordschancellor (t) Cowpen could by no means allow of the notion, that the preamble should refrain the operation of the enacting colaufes and that because the preamble was too harrow or defective therefore she enacting clause, which had general words, should be reftrained from its full latitude, and from doing that good which the words would otherwifes and of themselves imports which (with fame heat) this lard hip faid was a ridiculous notion; and inftanced in the Coventry

to Read, on flatures of Geo. II. vil. 916 (a) Lord chancellor Barbury. the late Mr. Haron Atkins, Sir James Burrow, and Mr. serjeant Wilson. (6) Co. Lit. 79. a. 3 Will. Rep. 434. 8 Mod. 144. W. Jo. 173, 174. Palm. 485. 4 Inft. 330. 2 Vern. (c) Wil. Rep. 320. See 3 Act Rep. 205 1 3 Dial.

on Law and Conft. 145. (1) Ask. Rep. 175. act,

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full act, which, if lit had recited the barbarity of cutting Coventry's note, itande the enacting clause had been igeneral, viz against the cotting of any member whereby the man is disfigured or defaced, it might with equal reason be objected, that dutting of the lips, or putting out the eye, would not have been within the act; because not within the preambles to the statutes concernisionasiq

of Mr. Rayner adds another inflance, in corrobotation of lord Couper's opinion, viz. the infolvent debtor's act , that as the preamble to the claufe for discharging faginives for debt, expresly mentions workmen, feamen, and mariners, and declares the legislative intention to be to enable fuch perfons to return, that yet (though the enacting clause be general, viz. " every debter ") no other petfon is within the meaning of the enacting clause, because not within the letter of the preamble : whereas it is well known the act in question is never to construed, but on the contrary, every fugitive for debt; chough neither workman, feaman, or mariner, is constantly discharged by witrue of the clause in question. See Rayn Pref. to Read, on statutes of Geo. II. vii.

Plowever lord (b) Hardwicke, and the late lord chief (c) baron Parker, both inclined to To. 173, 174. Palm. 485. 4 left. 330. 2 Vern.

<sup>(</sup>a) Stat. 22 & 23 Car. 2. C. 1.

Laifb) Atto Rep. 182. Le 200 See 4 All (a)

(c) Atk, Rep. 175.

be of opinion, that the enacting clause was to be restrained by the preamble; and though they had great honour for lord Cowper, could not subscribe to his reasons, that the preamble should not govern the enacting

clause.

A In Triesting this Tubject, We Tare conficious of no design to mislead you; we have afferted nothing without giving good authority; we generally quote the very words of the authors, and leave you to form your own judgment; if we differ from any writer on the subject, we constantly submit our reasons to the judicious reader, which are generally founded on inferences drawn from the statutes or determinations; this we conceive to be the furest method to be right in our conclusions. Our reasons we hope are given with due deference to the profession, especially to that part of them who have the honour of being in the commission of bankrupt; and also with that temper and good manners, which every reader has a right to expect. In the course of our notes and observations, it it is scarce possible when we have conviction on our fide, to remain altogether unconcerned; if therefore, in some passages, we should have exceeded moderation, we did not mean to offend, and hope that we shall not often fland in need of an indulgence on that account. demnified:

Easter Vacation, 1767.

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be of opinion, that the enacting claufe was be referained by the preamble; and though they had great honour for lord Comper, could not subscribe to his reasons, that the preamble should not govern the enacting

## PREFATORY DISCOURSE

of no delign to millead you; we have afferted nothing wit bring sood authority , we generally quote the very words of the au-

The appointment, qualifications, fees, authority, duty, indemnity, &c. of Commillioners of Bankrupt.

aft it is a hame for an et orator of causes," to be 01 9V199 rignorant of that law in which he is fo peculiarly be the furest method to be riburantour con-

S there are feveral matters which conod cern commissioners of bankrupt in general, we thought they could not be more properly confidered than at the head of the work; this therefore we will do under the following particulars, eralustrad gridwollof

Their appointment and qualifications. 2. Their authority or endreient ti ; bennee

and half we confirmation of the bankrupt flatutes;

1841 How the Commissioners are liable and indemnified ;

od Fafter Vacation, 27A7-

APRE

to Alighe appointment and quatification of whe which confifts in the due execution of immes

of The commissioners are verbally appointed (b) By the great leaf, in pursuance of ban (b) act of parliament, which ( mauchorizes the Brd chancellor, &c. to affigh by commission, Wife, honer, and differen perions in it is obfervable, that my lord Hardwicke was of opinion, according to Mr. baron (d) Atkins, that an office quam diu se bene gesserit had always (e) been held to have been an office for life a Sir Edward Chroke Tays, that an observance of the three qualities, wildom, honesty, and

(g) diferetion, are the best means for the exnoisuns discretion to be a legal wildem and discretion. w

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o Rep. 140. 4 Mod. Rep. 115. Sir Edward Colo (a) Lord keeper Harrourt, who had the feals in queen Antie reign, fielt ordered lifts of commissioners as at this day; previous to this period, the petitioning creditor inferred them at the bottom of his petition, 182 19the cultom even now in country commissions, for the approbation of the great feal. See Goodw. 419011b or . 81

S'(8) State 19 Elizacing hizuma to mos bresons ent

call diferences. Co. Lineag. b. . 322 Raffle See (A)

1971 198. Heb. 158. This is P. 213.9 18 1871 1881 1891 1791 (1) If fo, would there have been occasion for an act of parliament to continue judges in the enjoyment of their offices, during their good behaviour, notwithstanding any demile of the crown i Stat. I Geo. a. c. 23 or would lord chief just. Helt held his office determinable by the demile of the crown ? 2 lord Raym. 747. Foresc. Rep. 389. Cr. Car. 1, 2. As commissioners of bankrupts are appointed only durante bene placite, this may be thought a digression. Ballia Diorid

(f) 4 Inft. 278. 15 11 11

to Repulsion (g) Discretion is a knowledge or understanding to diftinguish between fallity and truth, between wrong and ecution of the bankrupt statutes, the life of which consists in the due execution of them, and (a) that every commissioner ought to have dues sales, viz. salem sapientie, me sit in spidus sites salem conscientia, ne sit diabolus; that is two grains eviz. as grain of knowlege to prevent his acting like a sool, and a grain of conscience, to prevent his acting like a devil, midth (h) nored a M or gain according like a devil, midth (h) nored a M or gain according

an office quam die se bene gesserre had always and hight between hadow and fubflance, between equity and colourable gloffes; and not to all according to one's own will and private affection; for as one has it, talis diferetio diferetionem confundit. 5 Rep. 100. The judges of the common law have interpreted .... dom and discretion to be a legal wifdem and discretion. 10 Rep. 140. 4 Mod. Rep. 115. Sir Edward Colo alfo fays, that differetion only we allow of in this place, which either grave and reverend men have used in such. cases before, or arises out of the circumstances of the mattero in Co. Lit. 620 for as by the authority of Littleword Diferento of diference per legem, quid fit juftum, that is, to difcern by the right line of the law, and not by the crocked cord of private opinion, which the vulgar call discretion. Co. Lit. 227. b. 10. Rep. 140. 2 Buffe 197; 198. Hob. 158. This is proved by the common law in the case of a special verdict, et super total moteoriang prinne discretionem jufliciariorum ; Le e they defire the judges will difcern by law what is just, and ofo give judgment accordingly 4 Int. 31. Fo tefc. Rep. 3930 80 a Jane decedas vagur eris, erunt omnia comibus incerta; and therefore commissions which authorize any to proceed, fetundum fanas discretiones Defleds, in as mach as sto fay, fecundum legem & confuetudinem Anglia. Co, Lit. 227. b. 10. Co. 138.. he thought a digression."

(a) 10 Rep. 140. 3 Inft. 223. 80 fint 4 (4)

nie in between hat tree truth, between wrong to nie between wrong

Sir Joseph Jekyll, sknight, mafter of the rolls, declared, that though (a) proceedings in equity were said to be secundum discretionem boni winis yet when it is alked, Kin (b) bonus quis? the answer is qui consulta patrum, qui Leges Juraque servato The discretion which is to be (c) exercised in Chancery, is to be governed by the rules of law and equity, which are not to oppose, but each, in its turn, sto be fubservient to the other; this discretion, in some cases, follows the law implicitly, in others, affifts it, and advances the remedy, in others again, it relieves against the abuse, on allays the rigour of it, but in no case does it acomization of overturn the grounds or principles thereof, as hath fometimes been ignorantly imputed to the court of Chancery; for that is fuch a diferetionary power, which neither Chancery, nor any other court, not even the highest, acting in a judicial capacity, is by the constitution intrusted with.

The (d) legislature has enjoined the commiffioners by an (e) engagement under the highest of all fanctions, " faithfully, imparof pankrupts, the names of five persons whom

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n(a) with Rep. 753, 754. 2 Edit. 1768.

(b) Hoh; ch. just. faid, that he was as much for reformation, sas any one, but in a legal manner, for Vir bonus est quit ? qui consulta patrum, qui Leges Juraque ser-war. 12 Lord Raym. 1302, 1303. 11 Mod. 252.

ph 3. 2 Eq. Cal. Abr. 98. pl. 98. pl. (8)

others, affifts it,

"atially, and honeltly, according to the best gof their skill and knowledge, to execute the feveral powers and trusts reposed in "them, and that without favour or affection, "prejudices or malice."

do The same (a) authority hath further enjoined the commissioners, upon pain of being (b) disabled to act, not to eat or drink at the charge of the creditors, or of the bankrupt's estate; for presume to take above twenty in charge of the wall was above to the charge of the creditors.

(a) Stat. 3 Geo. 2. 6. 30. 1. 42.

(6) On petition against feveral of the commissioners for taking more than 201. 4 piece at each meeting, and likewise ordering great sums of money to be charged for their eating and drinking, lord chancellor Hard-wirks declared them incapable, by virtue of the above flatute, to act any longer as commissioners in the execution of the commission, and that no further proceedings ought to be had thereon; and also that all further proceedings on the commission should be absolutely stayed : and that the petitioners should be at liberty to apply to his lordship by petition, to have the faid commission renewed, and directed to such new commisfioner to be named therein, as he should think fit, and for that purpose did order, that the folicitor for the petitioners should leave with his fecretary to the commisfioners of bankrupts, the names of five persons whom they should propose for his lordship's consideration, in order that proper persons might be appointed commisfioners in fuch renewed committion; and that the commissioners [2 Eq. Cas. Abr. 99.] petitioned against. should, out of their own pockets, pay the costs of the petitioner's application, and the costs of renewing the faid commission, to be taxed by the master, in case the parties should differ about the same. 7 Vin. Abr. 77. 2 Eq. Caf. Abr. 98. pl. 7.

-opt (a) rhas the (c) shorthim most has regnilling ner as if they were living. Lord chance this

declared himself no driend to commissions of bankrupt, they occasioning much injury; and instanced in a case before him, where othe charge and expenses of the commissioners and their attendants came to 400 L and the distribution to the creditors seven shillings in the pounds of This inconveniency, observed by lord fessives some many years ago, our felt even at this day in commissions executed in the gountry, some tests held, that the above standy does not extend to them; but it centainly does not extend to the many but it is the many but it is the many but it is the

all binding to any bod was not probable of pd. and berein of pd. are which it had now much where given the

ly differentionary and for caution, and not at

After a commission hath been dealt (c) in, they may proceed in the execution thereof, notwithstanding the (d) death of the bank-

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<sup>(</sup>a) Mr. J. Blackflone feems mistaken in saying 201.

per diem each, at every fitting. 2 Black. Com. 480. for
the words per diem are not in the statute; and it is not
to be presumed the legislature intended the commissioners should fit from morning till night for 201.

<sup>(6) 21</sup>Chan, Cal, 192: Onfirmano begierfinos worres

<sup>(</sup>c) Stat. 1 Jac. c. 15. f. 17. d. 17.

ropt, sor of thet (a) king, in the fame manner as if they were living. Lord chancellor (b) Talbot was of opinion, that declaring party bankrupt at three o'clock in the afternoon, and executing an affignment at fix, on a commission issued at eleven o'clock in the morning of the fame day, was a (c) dealing within the ract, and that the proceedings fould fland, though the commissioners had notice that the bankrupt died at one o'clock in the afternoon of that day s and his lordship faid he knew no sparticular act, as diffinct from another, which could be called a dealing : it had been faid, that a declaration of bankruptcy was the act meant, but that being only discretionary and for caution, and not at all binding to any body, it was not probable that the statute should intend that only a dealing, which it had not any where given the commissioners a power to do.

Lord Hardwicke often (d) observed, that a commission of bankrupt was a judgment and an execution in the first instance; and we may

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<sup>(</sup>a) Stat. 5 Geo. 2. c. 30. f. 45.

<sup>(</sup>b) Caf. Temp. Talb. 184.

though never is done in pursuance of the commission, though never so minute, is a dealing in it, [see 2 Chanc. Cas. 102, 103] and he said he could not therefore put a narrow constrained construction upon the words "dealt in," in order to overthrow the commission, and all the just right of the creditors claiming under it. Cas. Temp. Talb. 186.

<sup>(</sup>d) Atk. Rep. 67. pl. 22. id. p. 104, 152.

### PREFATORY PISCPLESE! XYJ x

add, that it is an execution of the highest nature, for it includes every execution and more; as a (a) fi. fa. it takes possession of all the bankrupt's goods and chattels; as an (a) eligit it felzes all his lands; and as a ca. fa. jects the party to a forfeiture (2) of his life, in cale he conceals any part of his estate, real or personal, to the amount of 20%. of

We therefore most earnestly and most ferioully recommend it to the commillioners, never to find any person Bankrupt, but upon a plain and express act of bankruptcy com-mitted; and we think ourselves extremely happy in being able to enforce this recommendation, not only from the justice of it, but a so from the authority of lord (d) Hardwicke himself; who has also (e) declared, that the commissioners are not bound implicitly to receive evidence, merely because it is upon oath, and therefore may even then reject it, if they have any reason to doubt of the veracity of it; the court of king's (f) bench also declared, that the commissioners were not obliged to receive for true, whatever the

cems there is no occation, 210 de Asirwicay (b) Stat. 5 Geo. 2. c. 30. f. 14. (a) But it feems that the 8 19 less companies of the lift cannot fit together, because the companies of them of the granuffor she fell that appointed neither of them of the granuffor See fol. 110. Note (a). Note (a).

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The authority of the commissioners to adjourn has been much doubted, but never we believe hitherto judicially disputed: it feems however very certain, that (a) three at least must be present in order to adjourn, because fewer cannot do any act whatever. The doubts have arole. 1. At choice of the affiguees; 2. On the bankrupt's last examination: and 3. On making a dividend: in this order therefore we will consider them.

As to the first, it may happen, that no creditor who has proved a debt to the amount of 10 l. or upwards, under the commissioners for the day appointed by the commissioners for the choice of assignees; and if o, it seems absolutely necessary for the commissioners to have authority in such case to adjourn the choice to a further day; and which we apprehend they may do too, without endeavouring to make the adjournment the joint act of themselves and of the creditors, by adding in the memorandum of the adjournment, that it was made by the consent, and as the request of the creditors then present; now it seems there is no occasion, and it is certain,

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(b) Stat. c Geo. 2. c. 30. f. 14.

<sup>(</sup>a) But it seems that the three loss comm shoners of the list cannot sit together, because the commission of bankrupt has appointed neither of them of the queras. See fol. 310. Note (a).

### PREFATORY DISCOURSE. Rogii

the commissioners have no authority to tack the above at the end of the memorandum.

( ) As to the second; my lord (a) Mansfield having declared that the spower of the commissioners to examine the bankrupt is not li-" mited and confined within the time allowed " him to submit to be examined; but that they may compel him to make furtheran-I fwer after that time 3 his lordship feems to imply an authority in them to adjourn, at least to finish such examination ; and the commissioners may perhaps be of opinion, (and not without reason) that this foleren determination of the chief-duftices authorizes them to adjourn at discretion, toties quoties.

And as to the third; there are often fo many debts to be proved on the day advertiled for making a dividend, that it is imposfible to do it at the time appointed, without excluding some of the creditors from the benefit of the dividend, or putting them to the charge of petitioning the great feal to be admitted, than to fuffer which we think it would be much more equitable in the commisd) So faid by Mr. judice (Lanuojbe ot eranoil

The commissioners can do no act one at a time separately; for the judges (b) have determined, that they could only act litting together on the commission? Caf. Timp. Talb. 185.

36. Atk. Rep. 177, 183, being made for the suppression of fraud: and yet this thould not be to Rep. 1124, 1127.

or the statutes are vehicles. Sel. Cal. Evid. 100.

(b) Strat. 568. Sel. Cal. Evid. 100.

remark is good; which is the selection of the selection.

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When the commissioners have assigned the rankrupt's estate, and given him their (a) certificate and bis discharge, they have (b) executed their authority and declared barusa

missioners to examine the bankrupt is not liand The construction of the bankrupt flatutes. se him to jubmit to be examined; but that

-nathercourts of justice have declared, that all the flatutes concerning bankrupts, are to be (r) construed according to their real intention that they are to be taken together, fo as to answer the great general end of the (d) legislature, as making one (2) System of law that they are to be construed by (f) equity som to adjourn at discretion, talies quoties.

. And as to the third; there are often fo (a) But if the bankrupt bath pot obtained his certificate, and after the commission awarded, and distribus tion made of all the bankrupt's effate towards fatisfaction of the creditors; lands, goods, &c defcend or come to the bankrupt, they shall be subject to a new fale and distribution, for the commissioners authority is

not fully executed until the creditors be fatisfied. Billing. (b) Wil. Rep. 385.

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(7) Bur. Rep. 439. 446. Som doum ad bluow

(4) So faid by Mr. justice (late lord chief justice) Wilnot 102 Bur Rep 1124 See Bur Rep. 442.

(e) Vent. 244. 2 Eq. Cal. Abr. 120. 4 Bar. Abr. 47. 7 Vin. Abr. 123.

1/ 2 Show. Rep. 519, 520. 2 Eq. Cal. Abr. 97.

Caf. Temp. Talb. 185. Stat. 1 Jac. co 19. 1. Mar. 36. Aik. Rep. 177, 183, being made for the suppression. of fraud; and yet this should not be too far extended, for the statutes are very penal, and my lord Baces's remark is good, which is, that it is an bard cafe to tor-Vhen tura

for the rakel of (a) creditors, they being undoubtedly remedial laws, are to be extended by equity, and not restrained as penal laws; and that if any construction can be made more beneficial for the creditors one than another, the court admits that construction as founded on the best of rules, wiz. "Maum chique trivaluere," of giving to every man his own:

and upon this foundation stand all the laws against bankrupts, which are also to be constructed for as to suppress (b) fraud.

at Jac. c. 10. The commissioners may plead Not Cul-mahni hnab oldail armier ranois immon adt will at there is no provision for a maining done by them on any of the sublequent states.

The courts of justice have also resolved that (c) as the commission and authority is by force of the several acts of parliament, which (d) ought to be pursued; if the commissioners find a person bankrupt who is not so, they are subject to the (e) action of the party grieved

ture laws, that they may forture men. Lord Bacon, de Aug. Scienc. lib. viii. cap. 3. Aphor. 13.

(a) The creditors good is the proper end of fuing out commissions of bankrupt. 2 Eq. Cas. Abr. 121.

(b) Bur. Rep. 474.

(c) 4 lnft. 277. 8 Rep. 121. 4 Mod. 116. T. Raym.

(d) 2 Show. Rep. 166. pl. 142. Com. Rep. 80.

(e) So faid by Iord chancellor King, Sel. Caf. in Chancello. But if in the proceedings the commissioners commit some mistake, which appears to be only an error of

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grieved, for he has no other remedy; but they may plead (a) generally, and are not driven to any special pleading.

The second of the second o

of their judgment; they shall not be liable to an action; by lord chief justice Holt. Comb. 3911 Lord chancellor Jeffries said, it was a mischief, that the act of parliament had subjected the commissioners to an action, for that no fufficient persons, and such as were at to manage such a concern, would undertake the trouble of its.

Vern. 154.

(a) 4 Inft. 278. By flat. 1 Jac. c. 15. f. 16. quere 21 Jac. c. 19. The commissioners may plead Not Gulty, or justify by flat. r Eliz. c. 7: 1 Jac. c. 15. But there is no provision for any thing done by them on any of the subsequent statutes.

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The courts of justice have also resolved that (i) as the commission and authority is by sorce of the several acts of parliament, which (a) ought to be pursued; if the commissioners find a person bankrupt who is not so, they are subject to the (e) action of the party are subject to the (e) action of the party

Aug. Scienc. lib. viii. cap 3. Aphor. 13.

(a) The creditors good is the proper end of fuing out committions of bankrupt. 2 Eq. Cal. Abr. 121.

(c) 4 lnft. 277, 8 Rep. 121. 4 Mod. 116. T. Raym.

Chamber 196. pl. 142. Com. Rep. 80.

Chamber 196. pl. 142. Com. Rep. 80.

Chamber 196. pl. 142. Com. Rep. 80.

Chamber 196. Put if in the proceedings the commissioners commit some mislake, which appears to be only an error

## Some Abbreviations explained.

A	
Atk. (a) Rep.	Baron Atkins's Reports in Chancery, folio.
Bar. Observ. on Stat.	The honourable Mr. justice Barring- ton's Observations on the statutes, quarto, 2d edition.
Beawes's Lex mercat, rediv	iv. Beawes's Lex mercatoria rediviva, folio.
Black. Com.	Doctor Blackflone's Commentaries on the laws of England, 4 vols. quarto, 1769.
Bur. (b) Rep.	. Mafter Burrow's Reports in the King's Bench, 12 vole folio.
Caf. of Set. and Rem.	Cases and Resolutions concerning set . tlements and Removals, 8vo.
Com Dig.	Lord chief baron Comyns's Digest on the laws of England, 5 vols. folio.
Fol.	This means the folios of this work, viz. The Spirit of the Bankrupt
g Kel.	Mr. justice Kelynge's Reports in the
М.	King's Bench, &c. folio.
7 Mod. 8 and 9 Mod.	Farresley's Reports, folio.  Modern Cafes in Law and Equity, fo-
to Mod.	Lucai'r Cafes in Law and Equity,
11 Mod.	Report of Cales in queen Anne's time,
za Mod.	Cases in the King's Bench, in Wil-
Rayn. Read. on flat. Geo.	
Sel. (c) Caf. Evid.	Strange's Select Cases of Evidence, octavo.
Sef. Caf.	Sessions Cases, 2 vol. octavo.
Bul. Tri. at Ni. Pri.	An Introduction to the Law relative to Trials at Nifi Prius, quarto.

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(a) All extracts from this book, are the determinations of the late lord chancellor Hardwicke, unless otherwise expressed.

(b) All extracts from this book, are the determinations of lord Mansfield, the present chief justice of the King's Bench, unless otherwise expressed.

(c) This book was suppressed soon after publication, by reason of its having been obtained suppressed suppressed.

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## Some Abbreviations explained,

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Fol. 1. in Notes, for Party's, read Party; and for as, read is.

27. Line 10, for latter, read former.

11, for former, read latter.

21, for leem, read feems.

76. 24, dele an indemnity, and Note (c).

220. in Notes, after Pref. to add Read, on.

263. 8, for fobfequent; read previous.

284. 6, after lefs, add than.

299. 1, for 276, read 296.

311. in Notes, for 383, 384, 4to Edit, read 390, 391,

8vo Edit, 1775.

314. Note (c), after No. infere 16.

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OF THE

## BANKRUPT LAWS.

## INTRODUCTION.

AYONG BERTHAMADA

Bankrupt is defined to be " a trader, who fecretes himfelf, or does cer-" tain other acts, tending to defraud " his creditors (a);" he was formerly confidered merely in the light of a criminal or offender (b); and in this spirit, we are told by fir Edward (c) Coke; that we have fetched as well the (d) name, as the wickedness of

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<sup>(</sup>a) 2 Black. Com. 285. 471. (b) Stat. 1 Jac. c. 15. S. 17. 2 Show. Rep. 516. 517. Aik. Rep. 77. id. 219, pl. 120. id. 242. Bur. Rep. 31.
2 Bur. Rep. 717. 2. Aik. Rep. 528. 8 Mod. 47.
(c) 4 Inft. 277.
(d) The word itself is derived from Bancus, or Banque,

which fignifies the table or counter of a tradefman, (Dafresue I. 969.) and ruptus, broken; denoting thereby

bankrupts from foreign nations; but at prefent the laws of bankruptcy are confidered as laws calculated for the benefit of trade, and founded on the principles of humanity as well as justice: and to that end they confer some privileges, not only on the creditors, but also on the bankrupt or debtor himself. On the creditors; by compelling the bankrupt to give up all his effects to their use, without any fraudulent concealment: on the debtor; by exempting him from the rigor of the general law, whereby his person might be confined at the discretion of his creditor, though in reality he had nothing to fatisfy the debt; whereas the law of bankrupts, taking into confideration the sudden and unavoidable accidents to which men in trade are liable, has given them the liberty of their persons, and some pecuniary emoluments, upon condition they furrender up their whole estate to be divided among their creditors (a). But still it is cautious of encouraging prodigality and extravagance, by this indulgence to debtors;

one whose shop or place of trade is broken and gone; though others rather chuse to adopt the word route, which in French fignifies a trace or track, and tell us, that a bankrupt is one who hath removed his banque, leaving but a trace behind. (4 Inft. 277.) And it is observable that the title of the first English statute concerning this offence, 34 & 35 Hen. Will c. 4. against such persons as do make bankrupt, is a literal translation of the French idiom, qui font banque route. Cowel. Verb. "Bankrupt."

(a) 2 Black, Com. 472.

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and therefore it allows the benefit of the laws of bankruptcy to none but actual traders; fince that let of men are, generally speaking, the only persons liable to accidental losses, and to an inability of paying their debts, without any fault of their own. If persons in other fituations of life run in debt, without the power of payment, they must take the confequences of their own indifcretion, even though they meet with fudden accidents, that may reduce their fortunes: for the law holds it to be an unjustifiable practice, for any perfon, but a tradefman, to incumber himself with debts of any confiderable value. If a gentleman, or one in a liberal profession, at the time of contracting his debts, has a fufficient fund to pay them, the delay of payment is a species of dishonesty, and a temporary injustice to his creditor; and if, at fuch a time, he has no fufficient fund, the dishonesty and injustice is the greater. He cannot therefore murmur. if he fuffers the punishment which he has voluntarily drawn upon himself. But in mercantile transactions the case is far otherwise: Trade cannot be carried on without mutual credit on both fides; the contracting of debts is therefore here not only justifiable, but neceffary. And if by accidental calamities, as by the loss of a ship in a tempest, the failure of brother-traders, or by the non-payment of persons out of trade, a merchant or trader becomes incapable of discharging his own debts,

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it is his misfortune, and not his fault. To the misfortune therefore of deptors the law has given a compassionate remedy, but denied it to their faults (a): fince, at the same time that it provides for the fecurity of commerce, by enacting that every confiderable trader may be declared bankrupt, for the benefit of his creditors as well as himself, it has also, to discourage extravagance, declared, that no one shall be capable of being made bankrupt, but only a trader, nor capable of receiving the full benefit of the flatutes, but only an industrious trader (b).

As the pirit of the bankrupt laws confids in the power and authority they give the commillioners, the following theers were compiled principally with a view to point out and establift that power and authority, for which purpole, we shall consider the following particulars, viziv that that wiriv lars

(a) Lord chancellor Parker fays, that the law makes no distinction, whether the bankrupt became so by his own ex-travagant way of living, or by missortunes. Wil. Rep. 622. Magno se judice, quisque tuetur biov vierviorda caw Das

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(6) 2 Black. Com. 473, 474. Des ... N. 2 (6)

nio the hands of another, with be

. ep. 19. pl. c. S. P. (1) a dough the party has left of his trade for some time if ne ablconds, &c. for debis walra Fed during his tracie is hill liable to the bankropt laws, bid, 411 pl. 7 &... (ep. 170 3 Keb. Rep. 45 th pt. 16. Lord Raym. 2 12 Mod. 159. Comb. 462. So he istor debis contrait CHAP.

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# some sberefere of deprose the law has given.

The Power and Authority of the Commissioners, in (a) declaring the Party Bankrupt.

IN order to constitute a legal, (for there is no such thing, as an (b) equitable) bankruptcy, the party must have (c) been a trader, he must have committed some act of bankruptcy, and

(a) Lord chief justice Holt said, that formerly the time was mentioned when the party became bankrupt, but it is omitted sorp, and that is is the wifer course. Lord Raym. 100. And lord Hardwicks said, that to prevent disputes about the time when the party became bankrupt, the commissioners always and in general, that he was bankrupt at the time the commission issued. Att. Rep. 78. 119. So said by lord Talber. Cas. Temp. Talb. 243, 244. Lord Hardwicks said, that where there was a joint commission against two partners, they must be each found bankrupt, (3 Salk. 61. Mod. Rep. 45). and though one of them should die, the commission might still go on, but if one of the joint traders be dead at the time of taking out the commission, it abated and was absolutely void. Alk. Rep. 97. pl. 44.

(b) 2 Wil. Rep. 429. 7 Vin. Abr. 85. pl. 8. 2 Vef.

Rep. 19. pl. 5. S. P.

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(c) Though the party has left off his trade for some time, yet if he absconds, &c. for debts contraded during his trade, he is still liable to the bankrupt laws. Sid. 411. pl. 7 Lev. Rep. 17. 3 Keb. Rep. 451. pl. 16. Lord Raym. 287. 12 Mod. 159. Comb. 463. So he is for debts contraded in his trade, Com. Dig. 521. or if he leaves off his trade, but puts his stock into the hands of another, with whom

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he must be sufficiently indebted; hence arise other particulars to be discussed, which we will consider in the order they occur, viz.

Themphaye determined, who.gniberT enders,

an 2. Acts of bankruptcy. a modw that

3. Debt of the petitioning creditor.

## 1. Trading.

It hath been said, that no person is stable to a commission of bankrupt, for following a trade, which did not exist at the time of Stat. 5 El. c. 4. intituled, "An Act containing divers Orders for Artificers, Labourers, "Servants of Husbandry, and Apprentices." But this opinion seems erroneous, because Stat. 5 El. was made to encourage labour, and busbandry, whereas the statutes of bankrupt were made to improve trade; besides, (a) labourers, busbandmen, &c. are held not to be within the meaning of those statutes.

he is partner in gain and loss. Palm. 325. Bur. Rep. 6, 8. or if he has effects of his trade in his hands, and upon credit of them contracts debts, though he does not buy any more goods. Ventr. 166. or if he becomes security for another, because he is trusted upon the reputation of his stock and dealings, as well where he is security, as where he contracts for his own debts. Palm. 325. By the above cases, it seems clear, that a trader indebted is liable to the bankrupt laws, though he has quitted trade, if not above six years, till he has discharged his former debts.

(a) See these heads in this work.

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The feveral bankrupt statutes have expressly declared, or the resolutions of the courts of justice in their interpretations of them, have determined, who are fuch traders, against whom a commission of bankrupt may decinosing creditor suffi

We will therefore, for the fake of method and perspicuity, consider this head under the two following subdivisions, viz.

1. What kind and degree of trading makes the

party an object of the bankrupt laws.

2. What kind and degree of trading does not. And, 100

1. What kind and degree of trading does.

Any (a) merchant, or other (b) person,

(a) Though merchandize was in the Saxon time, in an infantine state, yet it was even then much countenanced and encouraged, for it appears by one of Abelstan's laws, that " If a merchant so thrived, that he had "passed thrice over the broad sea by his own crast, he was " thenceforth a thane right worthy." By this law it may be inferred, that those only were considered as merchant. who hazarded themselves in distant voyages, with the produce of their country, and returned with fuch merchandize as their own country flood in need of, which most undoubtedly is the true idea of the real character of a merchant; and we do contend, that if a person is described in the commission, merchant only, without the addition of dealer or rhapman, he is not liable to the banksupt laws, unless he is proved to have both imported e to the bankrupt laws, though he ha, bestroque bine

(b) Every one man or woman, who gets bis or ber living by buying and felling, by trade or merchandize, may come under the denomination of bankrupt, upon bis or

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4 on Perferation of Bankruptcy of Shape 1. ufingothesbraded of merchandize a bysway of bargaining, (a) exchange, rechange, bartry, (b) chevilante or otherwise in gross or retailquorafeekings his strade of living uby buying and felling, being a natural-born fubject, bestamfe palien, or being demzen, may crofted with great lums of namakadabb) ad

Any wadelman is liable to a commission. who can maintain an action for calling him bankrupt: this appears from the necessary allegations in the declaration, and from the proof that the court requires on the trial of fuch action; for the court expects the plantiff not only to alledge in his declaration, that he is a tradesman, but also that he gains his living by buying and felling (e); and further, that he

ber failing in the world. Cr. Car. 549. W. Jo. 437. pl.

3. Mar. 34. pl. 67. Rol. Abr. 60. pl. 11.
(a) Drawing and re-drawing bills of exchange for large sums of money, and a continuation of it, is a trafficking in exchange, and a trading which will make a man liable to a commission of bankrupt, though no commission money allowed, and notwithstanding a loss ensued thereby 10 the bankrupt. By lord Hardwicke, Atk. Rep. 128. pl. 72.

(b) That is, making contracts. 2 Dufresne, 569.

The benefits as well as the penal parts of the bankrupt laws, are extended as well to aliens and denizens, as to natural-born subjects; being intended entirely for the detection of frauds, in which aliens are often as deeply concerned as natives. 2 Black Com. 474, 475.

(d) Stat. 13 El. c. 7. S. 1. 21 Jac. 1. c. 19. S. 2.

(1) 3 Mod. 112. Sid. 299. pl. 3. Hut. 50, 124, 328. Keb. Rep. 645. 2 Keb. Rep. 89. pl. 4. Cr. El. 268. pl. 6. Cr. Car. 31. pl. 1. Bulfir. 40. 4 Rep. 19. b. Rol. Abr. r

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is liable to become bankrupt within the statutes (a), all which they have declared must likewise be proved on the trial.

Though (b) artificers differ from those who buy and fell, yet they may be bankrupts.

Whereas persons dealing as (c) bankers, (d) brokers, and factors, are frequently intrusted with great sums of money, and with goods and effects of very great value belonging to other persons, such bankers, &c. are declared liable to the statutes concerning bankrupts (c)...

66. pl. 11. 62. pl. 23. Cr. Jac. 585. pl. 6. Styl. 420. T. Raym. 87. Dy. 72. b. pl. 6. in Marg. Godb. 49. pl. 45. 2 Lev. 214. 2 Jo. 140. 2 Show. Rep. 153. pl. 136.

(a) Hat. 50. 3 Mod. 155. Popb. 185. Noy Rep. 33. 34, 158. Cr. El. 794. pl. 39. Rol. Abr. 60. pl. 11. Lateb.

(b) Stra. 514.

(c) Bankers having taken upon them to act as scriveners; made it necessary for the legislature to add bankers, as being liable to commissions of bankrupt; and persons acting as bankers will be considered as such, though they do not keep open shops. By lord Hardwicke, Ark. Rep. 218. pl. 119.

(d) Lord chancellor Hardwicke inclined to think a pawnbroker within the several statutes concerning bank-rupts, and especially within the general words of the above clause; for though pawnbrokers are not expressly named, yet the general word "brokers" is the genus, and all other kind of brokeridge the species. Lik. Rep. 206. pl.

(e) Stat. 5 Geo. 2. c. 30. S. 39. continued to September, 1775, by Stat. 11 Geo. 3. c. 47.

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Though the trade be a very inferior one, yet if the party gets his living thereby, it will be a sufficient (a) trading to make him bank-rupt; as (b) carpenters, (c) cowkeepers, (d) vintners.

Though the party does not fell the same wares he buys, but converts them to saleable commodities, and then sells (a) them; as (e) bakers, (f) brewers, (a) clothiers, who buy wool, and convert it to cloths; (g) goldsmiths, (a) ironmongers, who buy rod or bar iron, and cause it to be worked up into wares; (a) locksmiths; (b) milliners; (i) nailers; (a) salesmen; (k) shoemakers; (l) smiths; (m) tanners; (n) taylors, and the like; here, though part of the gain is by bodily labour, and not by buying and selling, yet they are within the statutes of bankrupt; for the labour is only in

(a) Com. Dig. 521.

(b) 3 Mod. Rep. 155. or ship carpenters. Lord Raym.

(c) Goodinge. 13.

(d) Read. Stat. Law. 186.

(e) 3 Mod. Rep. 330.

(f) Com. Dig. 521. Read. Stat. Law. 186. Lord Raym. 1480.

(2) Sione. 120.

(b) Beawes's Lex. Mer. rediviv. 488.

(i) Goodinge. 12.

(k) 2 Black. Com. 476. Com. Dig. 521.

(1) 2 Black. Com. 476.

(n) 3 Mod. 330. Hut. 46.
(n) Their trade being now greatly altered, most of it consisting in buying and selling.

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melioration of the commodity, and rendering

rupt for debts contracted before, but not for

debts contracted (b) after.

If one for a while deals in a trade, and afterwards quits it, but leaves his stock in the hands of another, and goes share with the other, both in profit and loss, and after such quitting becomes indebted, and conceals himfelf from his creditors, he is (c) bankrupt.

land, and sometimes in England, may (e) be

bankrupt, but quere if only beyond fea.

Where a person carries on a trade in one kingdom, belonging to the crown of Great Britain, and comes over to another, a commission may be taken out by a creditor in the place where he then happens to be, as he has traded to this kingdom, and contracted debts here; so faid by lord Hardwicke; and his

(a) By Holt. ch. juft. Skin. 292.

(b) Comb. 463. Vente. 5. 12 Mod. 159. Lord Raym. 287. This is admitted by the court, according to Sid. 411. pl. 7. The court only seemed of that opinion, according to Lev. Rep. 17. so resolved, according to Palm. 325. See 3 Keb. Rep. 451.

(c) Resolved in Palm. 325. See Bur. Rep. 6. 8.

(d) Lord Hardwiese said, that the bankrupt laws were not adopted in Ireland. Att. Rep. 82. pl. 31. but they have since per Stat. 11 & 12 Geo. 3. ch. 8. of the Irish Acts.

(e) 2 Vern. 162. T. Raym. 375.

lordship observed there were several (a) instances of this kind, where persons belonging to the plantations abroad, and which is their sole place of residence, yet happening to be in England, have had commissions of bankrupt taken out against them here (b).

Lord (c) Hardwicke rather inclined to think, that a clerk in holy orders was liable to a com-

mission of bankrupt.

Though a man be a public (d) officer, as an excise man, &c. yet, if he will trade, he makes himself subject to the statutes of bankrupt(e).

If a person who is a trader, makes another executor who only (f) disposes of the stock

(a) John Affley went from England in 1720, and refided in Barbadoes till 1735, where he was a factor and a planter, and traded to England, by fending goods from his plantations, and receiving goods back again bought in England; and he disposed of goods sent from England in Barbadoes, for merchants in England as a factor, and being greatly indebted, came to England in 1737, and committing an act of bankruptcy, a commission issued, and upon a question, whether he was within the statutes of bankrupt, upon the authority of Bird and Sedgwicke. Salk: 110. pl. 5. (where a gentleman of the Temple going to Lisbon, turning sactor, trading to England, and breaking) was adjudged a bankrupt. By Hardwicke Chanc. Mich. 1737 Beaues's Lex. Mercat. rediviv. 488. 2d edit.

(b) Aik. Rep. 82. pl. 31.

(c) Aik. Rep. 198. See the arguments of counsel, and the chancellor's reasons, in Aik. Rep. 196. pl. 103.

(d) As of the army, Aik. Rep. 214. of the court,

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(e) Atk. Kep, 206, pl. 109.

(f) 3 Mod. 328.

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of his testator, it will not make the executor a trader, and liable to a commission of bank-rupt; and even if an executor is the representative of a wine-cooper, and finds it necessary to buy wines to refine the stock left by the testator, it will not make him a trader(a).

A feme covert in London, being a fole trader according to the custom, is liable to a com-

mission of bankrupt (b),

Petition to supersede a commission of bankrupt upon a suggestion of the party's being a
married woman at the time the commission
issued, and the wife of the petitioner; lord
chancellor Hardwicke said, that as the party was
admitted to be the daughter of a freeman of
London, and appeared plainly to be a separate
trader, by the custom of London, she was
clearly liable to bankruptcy, notwithstanding
her coverture. Petition dismissed (c).

Richard Fitzgerald (d), husband of Anne Fitzgerald, having for some years carried on the business of a linen-draper, in Saint Giles's in the Fields, in the county of Middlesex, on 14th March, 1768, agreed upon a separation, when articles were accordingly entered into for that pur-

(a) By lord chancellor Hardwicks, Ask. Rep. 102. pl.

<sup>(</sup>b) Stone 48. Read. Stat. Law. 186. Com. Dig. 521. 2 Black. Com. 477. cites La Viev. Philips. Mich. 6. G. 3 B. R. 3 Bur. Rep. 1776.

<sup>(</sup>c) Atk. Rep. 205. pl. 110.

<sup>(</sup>d) Ex parte Prefton, Jan. 7, 1772. MSS. notes.

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pole, and executed by and between them, and Thomas Hopton and Thomas Kirkman, appointed her truftees, whereby the faid Frezgerald, in order to make provision for his wife and children. and in confideration of 600h then by thim taken to his own use, out of his estate and effects, affigned unto the faid truftees all his flock in trade, houshold goods, and all fums of money due to him, and then out flanding on his books, together with the faid books. and the leafe of his house, upon trust for the faid Anne, as her own separate estate, to be disposed of, as she should think fit, and to be by no means subject to the debts, controul, or intermeddling, of her faid hufband. And it was thereby farther agreed, that the faid Anne should have the liberty of trading without any interruption from her husband, she paying all the debts then owing by him in trade, and maintaining their children at her own expence, and faving him harmless from the fame, and from all contracts and agreements to be thereafter entered into by her, either in the way of trade or otherwise.

The feparation took place, and the hufband received the 600 l. to his own use; and they ever after lived Teparate and apart from each other, and he went to the East Indies. The said Anne was left in possession of effects to the amount of gool. to be employed, and which were employed, by her, in the faid trade. And by buying and felling goods in the faid trade,

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trade, the got her living and maintainance for herself and children, continuing in ber busband's bouse, and there carrying on the business of a linen-draper, on ber own account, and in ber own

name, as a fole trader, near four years.

In December, 1771, a commission of bankrupt was taken out against her, when the commissioners refused to find her a bankrupt. because she was a feme covert, residing in the county of Middlesex, and not a feme sole merchant trading in the city of London (a); but, upon petition to the lord chancellor Appley, on 29 Jan. 1772, and upon disclosure of the above facts, (counfel being heard on both fides) his lord thip ordered (b) the commissioners forthwith to proceed to declare Mrs. Fitzgerald a bankrupt, and the messenger to take possession of her effects. And accordingly, on the 3d of February following, she was declared a bankrupt by the commissioners.

A gentleman at the bar, who had a colliery and dealt in coals at Durbam, was held fuch

a trader as might be bankrupt (c).

(a) And unless the commissioners were afterwards fatisfied, that this was not a legal reason for not finding the party bankrupt, they were perjured in declaring her

bankrupt.

(b) His lordship had no more right, as a judge, to make fuch an order, than he had to order the commiffioners to eat and drink at the expence of a bankrupt; nor ought the commissioners to have regarded so extrajudicial an order, otherwise than humbly remonstrating, thereto, that obedience was incompatible with their earb of effice.

(c) Sira. 514. 8 Mod. 46, 47.

There

There feems no doubt, but that an attorney at law is within the above (a) case, and may be bankrupt by buying and selling merchandize in the way of trade, and though he is of no proper calling as a trader, yet he shall be considered as a dealer and chapman, in like manner as a gentleman, who draws a bill of

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fpect to that particular bill.

By a resolution of the house of commons,

Veneris, 16° die Novembris, anno nono Georgii

Regis, 1722°, it was resolved and declared,

exchange, is deemed (b) a merchant with re-

nem. con.

"That no (c) co-partner in any trade or undertaking is intitled to the privilege of of this house, in respect of any matter re-

lating to fuch partnership."

However merchants, bankers, brokers, factors, scriveners, and traders, within the description of the statutes relating to bankrupts, baving privilege of parliament, were not (till the year 1763) (d) compellable to pay their just debts, or to become bankrupts, by reason of the freedom of their persons from arrests, upon civil process. But now any creditor, of sufficient (e) value,

(a) Stra. 514. 8 Mod. 46, 47.

(b) See Salk. 12. pl. 2. 2 Venir. 295. 310. Show. Rep. 325. Carth. 82. Comb. 45. 152. 153.

(c) Lord Hardwicke declared the same, Atk. Rep. 200.
(d) The declaration of parliament in the preamble to Stat. 4 Geo. 3. c. 33.

(e) For the sufficiency of which see "Debt of the pe-

titioning creditor," fol.

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Chap of that Jud Traging. of fuch merchants, &cc. observing the directions of this (a) act, may fue out a commission of bankropt, against any such merchant, &c. and proceed thereon, in like (b) manner as against other bankrupts (c).

Lord chancellor Hardwicke inclined to think a pawribroker within the feveral statutes con-

cerning bankrupts, and especially within the general words of the thirty-ninth clause of flatute of 5 Geo. 2. c. 30. for though pawnbrokers are not expressly named, yet the gene-

(a) Stat. 4 Geo. 3. c. 33.

(b) Though while he continues a member (fays lord Hardwicke) there are some particular powers of the commissioners that cannot be exercised. Ack. Rep. 201. and Stat. 4 Geo. 3. c. 33. S. 4. declares, that nothing in that act shall subject any person entiled to privilege of parliament, to be arrested or imprisoned, during the time of fuch privilege, except in cases made felony by the bankrupt acts.

By this provision it should be presumed, that bankruptcy does not vacate one's feat in parliament, and yet the fituation of a bankrupt feems incompatable with that of a member of parliament, it being necessary that the former should be divested of all estate, and the latter

have an estate of a particular yearly value.

King James the first, in his proclamation for a parliament, (as we have it from lord Bacon) out of his care for the common good, and without all prejudice to the freedom of elections, admonished all his loving subjects, that had votes in the election of knights, burgeffes, and citivens, that they be truly sensible not to disvalue or disparage the bouse with bankrupts and necessitous persons, who might defire long parliaments only for protection. See lord Bacon's Works, 4to edit. 3d vol. 387, 388.

(c) Stat. 4 Geo. 3. C. 33. S. 1.

ral word brokers in the statute is the genus, and all other kind of brokeridge, the species (a).

Lord Hardwicke (b) said, a commission of bankrupt formerly issued against a peer, an earl of Suffolk, for trading in wines, and though there might be some particular powers, that commissioners of bankrupts could not exercise against a peer, yet, notwithstanding this, he might be liable to a commission of bank-

rupt, if he would trade.

The statutes relating to bankrupts have been adjudged to extend to physicians, when they have been proved to have traded or merchandized, or to have bought and sold goods, essents, and merchandizes; and accordingly on the 29th of Oslober, 1726, a commission of bankruptcy was taken out against doctor John Leve, 2 physician, in Bristol, and he was found a bankrupt, on his being proved a dealer in copper and lead.

They also extend to private gentlemen, though never bred up to trade, but have only invested their money in it, in order to make better interest thereof, notwithstanding they have never acted or appeared in the trade, or been known to any persons trading with the person to whom they so lent the money, or been personally concerned in the buying and

felling any goods whatfoever.

(a) Atk. Rep. 2c6. pl. 109.

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<sup>(</sup>b) Atk. Rep. 201. See Stone 130. Stat. 4 Geo. 3. c. 33.

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Persons using the trade or profession of a fcrivener, receiving other men's monies or estates into their trust or custody, shall be ad-

judged (a) bankrupt.

The reason that scriveners, (who were more numerous than in latter (b) days) were included by the above statute of James 1. was for the relief of their creditors; whom they have otherwise more opportunities of defrauding, than any other fet of dealers; and they are properly to be looked upon as traders, fince they make merchandize of money, in the fame manner as other merchants do of goods and and other moveable (c) chatels.

Lord chancellor Hardwicke, upon confidering the above clause, declared he was clearly of opinion a ferivener was within the meaning thereof, and comprehended in the words, bankers, brokers, and factors, and the petitioner being one, ordered that the commissioners should proceed (d) in the execution of the

commission.

Though a scrivener does not keep an open shop, yet, as he receives money belonging to other people, and places it out on securities,

<sup>(</sup>a) Stat. 21 Jac. c. 19. S. 2. A scrivener was not within the statutes of bankrupt, before this act of zi Jac. Rol. Abr. 59. pl. 6. 3 Mod. 159.

<sup>(</sup>b) Atk. Rep. 218. pl. 119. (c) 2 Black. Com 475.

<sup>(</sup>d) Atk. Rep. 142, 143.

which is the business of a scrivener, he may be

(a) bankrupt.

Though dealing merely in (b) smuggling and running of goods is an offence, and contrary to act of parliament, yet still it is a trading within the meaning of the bankrupt acts, and fuch trader is liable to a commisfion (c).

Lord keeper (d) Wright held, that having a share in the stationer's company would make

a man bankrupt.

If the buyer of coals in the mine, fells them together with other coals, he bought at market, he thereby becomes a trader within the statutes of bankrupt. By lord chan. (e) Cowper.

A brickmaker may be bankrupt, because the earth is manufactured, and turned into quite another thing before it is fold.

lord chanc. (f) Camden.

The whole court of king's bench (except the late Mr. Justice Tates) entertained a doubt for some time, whether a retail (not a carcase)

(a) Aik. Rep. 218. pl. 119.

(b) Atk. Rep. 199.

(d) But Holt ch. just. inclined to the contrary. 2 Lord 1 10 11 days, on 11

at No. Pr. 37

Raym. 851, 852.

(e) Will. Rep. C. B. 170. Le ilai zeniona ot ment est (f) Will. Rep. C. B. 172.

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<sup>(</sup>r) What, shall it not? fays lord Hardwicke, because a man has the hardiness in a court of justice to say, I have been guilty of a breach of one law, and therefore release me from the breach of another. Ark. Rep. 198. 199.

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butcher was an object of the bankrupt-laws, in point of trading, but at last agreed, that he was. Hil. and Mich. Terms, 1767, 8 Geo. 3. B. R. Dalby v. Smith, MSS. Rep.

A chandler and a shopkeeper deal and trade sufficiently to answer that requisite of the bankrupt laws, upon the same principle a

butcher does.

2. What kind and degree of trading does not make a man an object of the bankrupt laws.

Buying and felling in order to promote a business which does not make a trader, will not cause a man to be bankrupt (a); nor will buying and selling in general, unless the party's principal means of living be gained thereby; and therefore a (b) farmer, though he buys beasts, corn and hay, and afterwards sells them, cannot be bankrupt; for his principal means of living is by his labour, and not by his buying and selling; nor a (c) drover or (d) grazier (as such); for though

(a) Stra. 514.

(b) Cro. Car. 549. Stat. 5 Geo. 2. c. 30. S. 40. Salk.

10. Stra. 513. 8 Mod. 48. T. Raym. 287.

(c) Stat. 5 Geo. 2. C. 30. S. 40. Before this statute a arover was within the description of a bankrupt Dane. Abr. 686. pl. 1. One who buys cattle at one fair, keeps them three or four days, on his own ground, and then drives them to another fair to fell, is a drover within the meaning of Stat. 5 Geo. 2. Mills v. Hughes. Mich. 19 Geo. 2. C. B. Tri. at Ni. Pri. 37. S. C. S. P. in totiden verbis.

(d) Stat. 5. Geo. 2. c. 30. S. 40.

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they also buy and sell beafts, &c. in the course of husbandry, yet trade is not their (a) principal, but only a collateral object, their chief concern being only to manure and till the ground, and make the best advantage of its produce, and besides, the subjecting them to the laws of bankruptcy, might be a means of defeating their landlords of the fecurity which the law has given them above all others, for the payment of their reserved rents; wherefore also, upon a similar reason, a receiver (b) of the king's taxes is not capable (as such) of being bankrupt; left the king should be defeated of those extensive remedies against his debtors, which are put into his hands by the prerogative (c).

Buying and felling under particular reftraints, or for particular purposes, will not make a man a bankrupt; as if a commissioner of the navy uses to buy victuals for the fleet, and disposes of the surplus and refuse, he is not thereby made a trader within the statutes (d).

It must be a general trading, and of personal (e) things too, therefore if a man pur-

(a) Read. on Stat. Law, 184, 185.

(c) 2 Black. Com. 475.

(e) Mar. 37.

chases

<sup>(</sup>b) Stat. 5 Geo. 2. c. 30. S. 40. Lord chancellor King said, that declaratory clauses in temporary laws might be perpetual, as that graziers, farmers, &c. could not be bankrupts, as mentioned in Stat. Geo. 1. though the act be expired. 2 Kel. 7. 2 Barnard. K. B. 255.

<sup>(</sup>d) Salk. 110. Skin. 292. Ventr. 270.

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chases and sells lands, (a) or if he be a butler, steward to the king, to the Inns of Court, (b) &c. or a farmer of the customs, excise, &c. such cannot be bankrupt (a).

A man who lives by buying only, and not felling cannot be bankrupt; or by felling only (a), but it must be both by buying and felling; and also getting a livelihood by it; as by exercising the calling of a (c) merchant, a grocer, or mercer, or, in one general word, a chapman, who is one that buys and and fells any thing. Nor will one single act of buying and selling make a man a trader; but it must be a repeated (d) practice, and profit by it (e).

A trader cannot be bankrupt for debts con-

<sup>(</sup>a) Com Dig. 522.

<sup>(</sup>b) Skin. 292.

<sup>(</sup>c) See fol. 3. note (a).

<sup>(</sup>d) So that it should seem that a commission which issued some sew years ago, against a clerk in the Excession office was illegal; the case was this; the party being considerably indebted, his friends advised him to become bankrupt, but were at a loss how to make him a trader; at last, it was agreed that, as he was an Herefordshire man, he should provide himself with a quantity of cyder, and sell it to his friends and acquaintance; though this, and this only was the trading, yet the commissioners were pleased to hold it a sufficient trading for the purpose of defrauding his creditors. Another: a gentleman had bought several books for his amusement or improvement, and afterwards sold them; this was held buying and selling for the same meritarious purpose.

<sup>(</sup>e) 2 Black. Com. 476.

tracted after he has left off his trade, (a) though he afterwards becomes a trader again (b); though after leaving off his trade, he fells his old stock (c). But quere, for afterwards the court held such a person bankrupt; and see the reason given for the resolution in Ventr. 166.

No member of the bank (d) England, of the East (e) India, or English (f) linen company; nor any person circulating (g) exchequer bills; nor any adventurer in the royal (b) fishingtrade, or Guinea company; nor any member of the London (i) Assurance, or Royal

(a) Sid. 411. pl. 7. (b) Lew. Rep. 17.

(c) Ventr. 29.

(d) Stat. 7 & 8 W. 3. c. 31. 8 & 9 W. 3. c. 20. S. 47. 5 An. c. 13, 7 An. c. 7. 3 Geo. c. 8. S. 43, &c. Buying and felling bank flock, or other government fecurities will not make a man a bankrupt, they not being goods, wares, or merchandizes within the intent of the statute, by which a profit may be fairly made. 2 Black.

Com. 476.
(e) Stat. 13 & 14 Car. 2. c. 24. S. 3. Such trading did bring a man within the flatutes before this act. Good. 17. Dealing in East India stock will not make a man liable to bankruptcy. 2 Wil. Rep. 308. See Com. Rep. 355, 356. But if a trader put money into the East India company and abscord, he is a trader within this

act. 2 Keb. Rep. 487. pl. 30.

(f) Stat. 4 Geo. 3. c. 37. S. 13.
(g) See the feveral flatutes relating thereto.

(b) Stat. 13 & 14. Car. 2. c. 24. S. 3.

(i) Stat. 6 Geo. c. 18. S. 16.

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(a) Exchange, or (b) South Sea companies, or a tharer in the stationers (c) company, or in the plate (d) glass manufacture, shall be deemed bankrupt on account of his stock in the faid

companies.

A man makes a (e) bill of fale of fome land and personal estate to another, intrust, to pay his debts; the trustee takes the whole into possesfion, and disposes thereof, this will not make him a trader, and liable to a commission of bankrupt; for there is no fuch thing as an equitable (f) bankruptcy.

Lord chancellor Parker (g) faid it would leffen the credit of the nation to make trust

flock liable to bankruptcy.

No handicraft (b) occupation (where nothing is bought and fold, and therefore an extensive credit for the stock in trade is not neceffary to be had) will make a man a regular (1) bankrupt, as that of a gardener, (k) gold-

(a) Stat. 6 Gro. c. 18. S. 10.

(b) 9 An. c. 21. 3 Geo. c. 9 S 7. 5 Geo. c. 19. 6

Geo. c. 4. 8 Geo c. 4. c. 21. S. 12.

(c) Halt, ch. just inclined to this opinion; but ford keeper Wright held that such sharer was not within the bankrupt flatutes. 2 Lord Raym. 851, 852.

(d) Stat 13 Geo. 3. c. 38. but quere, and confider the

act.

(e) Wil. Rep. 314.

(f) 2 Wil. Rep. 429.

(g) 3 Wil. Rep. 187. note (A).

(b) Cro. Car. 31.

(i) 2 Black. Com. 476.

(k) Stone 120.

beater,

beater, (a) gun-founder, busbandman, (b) weaver, and the like, who are paid for their work and in the case of one (VY Whith in (2) ruodal

Though many commissions have issued against dyers, yet they do not (d) seem liable to the bankrupt laws, for the very fame reafon that working carpenters, and working taylors are not, because they do not get their living by buying and felling, but by their work and labour bestowed on the goods sent them by their customers: in short, for the same reason, no manufacturers can become bankrupt.

An infant under the age of twenty-one years, though a trader, cannot be made a hankrupt in respect to debts contracted during his infancy, though the act of bankruptcy be committed after he was of age (e), for an infant can owe nothing but for necessaries; and the statutes of bankruptcy create no new debts, but only give a speedier and more effectual remedy for recovering fuch as were before due (f). And no person can be made a bankrupt for debts which he is not liable at

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<sup>(</sup>a) Because he works for the service of the army, and the work is delivered for the use of the king. Skin. 292. And because it is a particular undertaking. Show. Rep. 270.

<sup>(</sup>b) Cr. Jac. 585. pl. 6.

<sup>(</sup>c) Cr. Car. 31.

<sup>(</sup>d) See 3 Mod. 328. (e) Bul. Ni. Pri. 38. S. P. (f) 2 Black. Com. 477.

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law to pay (a). Lord chancellor Hardwicke faid, that notwithstanding lord (b) Macclessield held in the case of one (c) Whitlock, that an infant might be a bankrupt, yet it had been determined otherwise (d) since (e).

(a) Lord Raym. 443. 12 Mod. 243.

(b) Lord chancellor Macclesfield doubted, whether he might not be a bankrupt; but lord chancellor King was clear of opinion he could not. Sel. Cas. in Chanc. 46.

whether there were not some other ingredients in this case of Whillieck, upon which the resolution turned, but his lordship said, he gave no opinion. Fitzgib. 200. pl.

12

(d) We believe there is no Book Cafe fince. Whether an infant trader be bound for debts contracted in support of his trade, fo far as to be liable for them in an action during his infancy, feems a point rather unfettled; and as the question is of exceeding importance to a commercial nation, we presume our setting forth the authorities on each fide of the question, may not be confidered as a total loss of time, which are, that Parker, ch. just. Page, J. B. R. and Trever, ch. just. C. B. are faid to have been of opinion, that where a person took upon himself to trade and all as of age, he ought to be presumed of oge, and no evidence of parish registers should be admitted against it. 12 Vin. Abr. 303. [P. b. 4.] Age, pl. 3. The late Mr. baron Clarke, in an action before him, against an infant, set up in a farm, and who had bought sheep of plaintiff, in the way of farming, upon giving his nonage in evidence, directed the jury to find a verdict for plaintiff, (which we presume they did in chedience to his lordthip's direction, for, as to this, the book is filent) and the baron faid, he thought the law ought not to put it in the power of infants to impose upon the rest of the world. Bul. Ni. Pri. 151. Lee, ch. juft. B. R. would not fuffer plaintiff to recover tobacco fent defendant, an infant, who C 2

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An innkeeper cannot, as (f) fuch, be a bankrupt; for his gain or livelihood does not arise from buying and felling in the way of merchandize, but greatly from the use of his rooms and furniture, his attendance, and the like; and though he may buy corn and victuals to fell again at a profit, yet that no more makes him a trader, than a (g) schoolmaster or

kept a shop in the country; his lordship relying on the opinion of the court of king's bench, given in a fimilar action, which was, " that an infant's buying for the maintenance of his trade, should not bind him, for an in. fant was not to be bound by his bargain for any thing, but for diet, apparel, or necessary learning." See Cro. Jac. 494. Or, we take leave to add, Lodging, Woshing, and Phylic. And lord Lee observed, that the law would not suffer an infant to trade, because it might be his undoing. See 2 Sira. 1083. Though the reader should not think the opinions of a chief of each court, together with a puisne judge's and baron's, sufficient to affect lord chief justice Lee's opinion; yet he will, I presume, agree with me, that if a minor goes about town, pretending to be of age, and defrauds persons by taking goods upon credit, and then prevents their recovering the value of them, by infilling on his nonage, he may be indicted, and punished as a common cheat. Horarent bar cano

(e) Ak. Rep. 146. pl. 86.34 (siguranted ett) before

(f) But where an inn-keeper is a chapman allo, (one who buys and fells any thing, 2 Black Com 476.) he may on that account be bankrupt, though not barely as an inn-keeper, and this has been frequently feen. 7 Vin. Abr. 57. pl. 15. in notes. . 9 to malwound yller a

(g) Some few years ago a commission issued against a schoolm fter, and he was declared bankrupt; the trading was buying books and felling them to his scholars; as this commission was inserted in the Gazette, that circumstance alone, it seems, according to Davies, (the folio writer on the b nkrupt laws) is an incontestible proof of the legality of the commission; as the Gazette is a paper other

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aper her other person is, who keeps a boarding house, and makes considerable gains by buying and selling what he spends in the house, and such an one is clearly not (a) within the (b) Statutes.

The whole court of king's (c) bench held that a victualler, quatenus a victualler, was not liable to the bankrupt laws; because, first, he was within the reason of the law, touching innkeepers, as to bankruptcy; secondly, that it was too mean an employment to be an object of the bankrupt statutes, and that, thirdly, the effects of such a bankrupt would scarcely defray the expences of the commission, but that a victualler who dealt wholesale in rum, brandy, &c. might become bankrupt; and the court considered, answered, and refuted the case of Meggot v. Mills, [reported in R. Raym. 286. & 12 Mod. 159.] The late lord

published by authority, such commissions are a disgrace to it, as well as to the great seal; but we may be told that this, and the other commissions noticed by us in note (d) of sol. 19. were, what are vulgarly called friendly ones, and therefore as the parties most materially interested (the bankrupts) were satisfied, nay, perhaps solicited the commission, all is right; but with due submission, the creditors, and not the tankrupts, are the parties most materially interested, and what is still worse, most materially injured by friendly commissions, for they are generally f audulant ones.

(a) Lord Raym. 287. Carth. 151. 3 Mod. Rep. 330.

Ventr. 270. Skin. 292.

(b) 2 Black. Com. 476. 12 Mod. 159. Lord Roym.

287. 3 Mod. Rep. 392. Show Rep. 96. 269.
(c) Eaft. Term, 7 Geo. 3. 1763. B. R. Sanderson v. Rells, MSS. Rep. Bul. No. Pri. 39. S. P.

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chancellor (a) Camden approved of the above determination, and so did the late lord chief

justice (b) Wilmot.

Notwithstanding the fanction of fuch respectable authorities, we cannot adopt the doctrine; because, first, as the common alehouse-keeper does not get his livelihood principally from the use of his rooms, furniture, attendance, and the like, nor professedly keeps a boarding or lodging house, he does not seem to come within that legal description of an innkeeper, schoolmaster, &c. essentially necesfary to exempt them, and upon which partilar description alone, they are exempted from the bankrupt laws. Secondly, because the meanness of the trade does not at all affect, or apply to a case on those laws, for they are fatisfied, if the party gets bis living by the trade he follows, be it ever so inconsiderable; and it is a common observation, that the dealers in the lowest commodities have the bigbest prices, and that retail custom is much more profitable than wholefale: the retail dealer is termed the tradesman, the wholesale dealer the warehouseman; consider the revenue on beer and spirituous liquors for excise and licence, consider the profit of the tap and bar, many victuallers in London drawing fix butts of beer a week, and clearing forty-fix shillings out of every butt, and as much every

<sup>(</sup>a) Wilf. Rep. C. B. 171. (b) See Wilf. Rep. C. B. 2 22.

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week on the fale of rum, brandy, &c. at leaft; these profits equal, if not exceed, the annual income of many in the liberal profesfions. Thirdly, because the objection of expence, is a general objection, and applicable to every creditor, who brings an action, and who ought to take care not to run himself to an improper expence, any more in fuing out a commission, than in bringing an action; and which he may easier avoid in the latter than the former case, because the expence of a commission can more certainly be calculated, than that of an action, in order to obtain execution. Besides, as the legislature hath declared, that no commission shall issue against any person, unless the debtor owes the petitioning creditor 100 l. the trade that fuch a person carries on, cannot be so very inconsi-But to conclude with two arguments, not hitherto mentioned, either of which feem decifive in favour of our opinion; which are, first, that as the principal object of the bankrupt laws is to over-reach all fraudulent transactions, and to give every creditor a proportionable part of the debtor's effects, this legal affiftance is chiefly wanted in the case of the creditors of a vietualler; for he is commonly fet up by a brewer, who gives him an unlimited, delufive, and false credit, by obliging him, before he fuffers him to take possession, or fends him any liquor, to execute a bond and judgment for what fum he

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pleases, without any stay of execution; and when the alchouse keeper is so far indebted that his effects just cover the brewer's demand, his execution sweeps them all away.

Again, Is a victualler or common alehouse-keeper so far considered in the eye of the law, a tradesman, that he can maintain an action for calling him bankrupt? Those who contend, that his being able to maintain such action, does not at all conclude his being liable to become bankrupt, are referred to fol 4. of this book; and those who are inclined to think, that the reputation of such a dealer is not protected by the law, are referred to any news-paper lawyer.

According to the above determination of Sanderson v. Rolls, a coffeeman, or coffeehouse-keeper, cannot be bankrupt for the very self-

fame reasons given in that case.

A buyer or farmer of alum works cannot be bankrupt, held per lord (a) Mansfield.

A buyer of coals in the mine, by working the mines and felling the coals, is not a trader within the statutes of bankrupt, held per lord (b) Cowper. S. P. by lord Camden.

Having part in a ship will not make the party a trader, unless he freights (e) it; nor

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<sup>(</sup>a) W.lf. Rep. C. B. 170. 172.

<sup>(</sup>b) Wil. Rep C. B. 170.

<sup>(</sup>e) Com. Rep. 356.

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when he freights it, if he does not get to much as is due upon the bottom for (a) repairs; nor will having a share in a barge, or stage coach, which are let to hire (b); nor will having some stock in a ship make the party a merchant, because it is frequent for persons to adventure some particular things in such a ship for such a voyage, and by the statutes of bankrupt, professed merchants are only meant, who are in constant (c) trading.

Sutlers (d) to armies are not liable to the bankrupt laws, neither does the having a joint stock without some proof of the disposal of it (e), make a man subject to those laws.

Mere (f) working taylors are not within the statutes of bankrupts, because they do not get their living by buying and selling, but by making garments for their customers, who send them the materials they work upon. Nor are mere working (g) carpenters, being only labourers.

(b) T. Raym. 287.

<sup>(</sup>a) Sid. 411. pl. 7. Ventr. 2).

<sup>(</sup>c) Salk. 109, 110. Skin. 276. pl. 1. Id. 291. pl. 2. Comb. 181.

<sup>(</sup>d) 3 Keb. Rep. 451. pl. 16.

<sup>(</sup>e) 2 Keb. Rep. 487. pl. 30. (f) Read. Stat. Law. 185.

<sup>(</sup>g) By Powell Just. Comb. 74.

# 2. Acts of Bankruptcy.

Having (a) thus considered who may, and who may not, be made a bankrupt, we are to enquire, fecondly, by what acts a man may become a bankrupt. A bankrupt is a trader, who secretes himself, or does cer-44 tain other acts, tending to defraud his cre-" ditors." We have hitherto beene mployed in explaining the former part of this description, "a trader:" let us now attend to the latter, " who secretes himself, or does certain other acts, tending to defraud his creditors." And in general, whenever fuch a trader, as is before described, hath endeavoured to avoid his creditors, or evade their just demands, this hath been declared by the legislature to be an act of bankruptcy, upon. which a commission may be fued out. For in this extrajudicial method of proceeding, which is allowed merely for the benefit of commerce, the law is extremely watchful to detect a man, whose circumstances are declining, in the first instance, or at least as early as possible: that the creditors may receive as large a proportion of their debts, as may be; and that a man may not go on wantonly wasting his substance, and then claim the benefit of the statutes, when he has nothing left to distribute.

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<sup>(</sup>a) Black. Com. 4773

# Under this head we purpose considering

1. What are not alls of bankruptcy.

2. What are.

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3. Evidence of them.

4. What are repealed; and

1. What are not alls of bankruptcy.

According to lord Bacon's method, we will first take the negative side of the question, and consider what are not acts of bankruptcy.

The feveral acts of bankruptcy, expressly defined by the statutes (a) relating to this title, being so numerous, and the whole law of bankrupts being an innovation on the common law, our courts of justice have been tender of extending or multiplying acts of bankruptcy by any conftruction or implication (b); and therefore L. C. J. Holt held, that a trader, upon hearing that a writ of fi. fa. was issued against him, to the intent to preserve his goods from being levied in execution, his clandestinely conveying them out of his house, and concealing them privately, was no act of bankruptcy (c); for the ftatutes mention only fraudulent gifts to third persons, and procuring them to be seized by

<sup>(</sup>a) These statutes do ascertain what acts make a man bankrupt, and there can be no such thing as an equitable bankruptcy, it must be a legal one. So said by Sir. Joseph Jekyll, master of the Rolls, 2 Wil. Rep. 429.

<sup>(</sup>b) Black. Com. 479.

sham process, in order to defraud creditors; but this, though a palpable fraud, yet falling within neither of those cases, cannot be ad-

judged an act of bankruptcy (a).

So also it has been determined expressly, that a banker's stopping or refusing payment is no act of bankruptcy (b); for it is not within the description of any of the statutes, and there may be good reasons for his so doing, as, suspicion of forgery, and the like; and if, in consequence of such resusal, he is arrested, and puts in bail, still it is no act of bankruptcy (c).

A man's giving money for notice when a writ shall come to the sheriff's office against him, is no proof of an act of bankruptcy, for he may do it to prevent his credit being (d)

blown.

#### 2. What are alls of bankruptcy.

In order to learn what the particular acts of bankruptcy are, which render a man bankrupt, we must consult the several statutes, and the resolutions formed by the courts of justice thereon; among them appear the following ones:

(a) 2 Black. Con. 279.

(th) Moseley's Rep. 3. 7 Vin. Abr. 61. pl. 12. in marg. Sel. Caf. in Chanc. 42, 43. Pakeman v. Hoskins in the Lords 21 Feb. 1726. MSS. Journ.

(c) 7 Mod. 139.

1. Depart-

<sup>(</sup>d) So said by Fortescue Just. at Hereford Affizes, 4 Geo. 2. Tri. at Ni. Pri. 38. S. C. S. P. in totidem verbis.

1. Departing the realm.

2. Withdrawing out of the king's dominions, to any foreign parts, to the intent thereby to remain, in defraud of creditors, and not returning within three months after proclamation.

3. Beginning to keep house.

4. Absenting.

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5. Taking Sanctuary.

6. Willingly or fraudulently procuring bim-

7. Suffering bimfelf to be outlawed.

8. Yielding bimself to a prison.

9. Departing from bis dwelling-bouse.

10. Willingly or fraudulently procuring bis goods, money, or chattels to be attached or sequestered.

ance of bis lands or chattels.

12. Obtaining any protection (otherwise than being lawfully protected by parliament.)

of the king's courts, any petition or bill against his cred tors, or any of them, thereby desiring or endeavouring to compel them to accept less than their just and principal debts, or to procure time or longer [more] days of payment, than was given at the time of their original contrasts.

14. Being arrested for debt, after bis arrest, lying in prison two months upon that,

15. Being arrested for one bundred pounds or more, of just debt, after fuch arrest, escaping cut of prison.

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16. Paying to the petitioning creditor, or delivering to him goods or security for his debt, whereby he shall privately. have more in the pound, than the other creditors.

17. Negletting to make satisfaction for any just debt to the amount of one hundred. pounds, within two months after service of legal process, for such debt, upon any trader having privilege of parliament ..

The reader is defired to observe (to avoid repetitions) that these several acts of bank. ruptcy must be committed with an intent, or whereby creditors (a) are or may be defrauded, or defeated of, or delayed from, the recovery of their just debts (b). And also that they must be committed subsequent both to

(a) Cited (as fo determined) by Sir John Strange (late-Mafter of the Rolls) in Degols v. Ward Hil. 12 Geo. 2. Tri. at Ni. Pri 37. S. C. S. P. in totidem verbis.

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<sup>(</sup>b) Stat. 13 El. c. 7. S. 1. 1 Jac. c. 15. S. 2. Palm. 325. Keb. Rep. 11. pl. 25. Cal. Temp. Helt. 95. pl. 5. Sak. 110. pl. 6. Atk. Rep. 77. ib. 201. pl. 104. Bur. Rep. 439, 472.

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the trading and the petitioning (a) creditor's debt, and within (b) fix years next before the iffuing of the commission; and to observe further, that it is a point not yet (c) settled, whether committing acts of bankruptcy beyond sea, be within the reach of the statutes.

### 1. Departing the realm (d).

By this a man withdraws himself from the jurisdiction and coersion of the law, with intent to defraud his creditors (e).

(a) 2 Stra. 744. Caf temp. Talb. 243, 244. Sel. Caf.

of Evid. 147. See Wil. Rep. 783. pl. 229.

(b) Mufeley 37. Lord Taltor feemed of opinion, that an act of bankruptcy committed four years before the commission issued, was too stale, but on appeal, the Lords, with the concurrence of all the Judges, reverfed his decree founded on abas opinion. Caf semp. Talb. 243, 244. By Stat. 21 Jac. c. 19. S. 14. no lona fide purchafer shall be impeached by virtue of the bankrupt statutes, unless the commission be sued forth within five years after the party becomes bankrupt. If therefore a commission of bankruptcy could not iffue in any case whatsoever, beyoud that time, this declaration of the legislature feems nugatory, for who could be affected by an act, which could never exist? But it must be within fix years, because the petitioning creditor's debt, whereon the commission is founded, must have accrued within that time. Moseley 37. and the act of bankruptcy (as observed above) must be subsequent, in point of time, to the petitioning creditor's debt.

(r) 2 Kern. 162.

(d) Stat. 13 El. c. 7. S. 1. 1 Jac. c. 15. S. 2.

(r) 2 Black. Com. 478.

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A merchant departs the realm to merchandize, and becomes indebted, and to avoid arrests, defers his return; this doth tantamount to a departing of the realm (a).

If a merchant departs the realm with the consent of his creditors, he does not thereby

commit an act of bankruptcy.

A capias de excommunicato capiendo is awarded against one, who, for fear of arrest, departs the realm, he is no bankrupt (b).

The same for departing the realm for fear

of an attachment in chancery (b).

In the case of one Woodier, a mercer on Ludgate-Hill, against whom his going beyond sea being given in evidence, it was insisted, that shewing quo animo it was done, (viz. on account of having killed his wife) it could not be construed an act of bankruptcy; but it appearing that his creditors were thereby in fact prevented from recovering their debts, chief justice Reeves held it was, but if that fact had not come out, it would have been otherwise (c).

2. Withdrawing out of the king's dominions, to any foreign parts, to the intent thereby to remain, in defraud of creditors, and not

(a) Read. Stat. Law. 186.

(b) Com. Dig. 523.

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<sup>(</sup>c) Cited by Sir John Strange, late Master of the Rolls, in Degols v. Ward. Hil. 12 Geo. 2. B. R. Bur. Rep. 471. 484. Tri. at Ni. Pri. 37. S. C. & S. P. in totidem werbis.

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returning within three months after proclamation (a).

This clause seems to have provided against a consequence, not within the letter of any of the subsequent statutes; for those statutes only make it an act of bankruptcy, to depart the realm, with intent to defraud creditors; but if an infolvent trader should go abroad without such fraudulent intent, and with the knowledge and confent of his creditors, and should afterwards remain there, and become opulent, and pay no regard to his creditors, in such case it might be doubted, whether he was bankrupt, within the defcription of those acts, but the clause last mentioned feems to have provided a remedy against fuch, as having withdrawn themselves out of the realm, remain there with intent to defraud their creditors, and in that respect is more full than the subsequent statutes (b).

#### 3. Beginning to keep bouse (c).

Keeping in his own (d) house, privately, fo as not to be feen or spoken with by his

<sup>(</sup>a) Stat 34 & 35 Hen. 8. c. 4. S. 5. (b) Ruf. Pref. to Stat. XV. but see Wil. Rep. 429. Atk. Rep. 77.

<sup>(</sup>c) Stat. 13 El. c. 7. S. L. 1 Jac. c. 15. S. 2.

<sup>(</sup>d) Or having no house of his own, keeping in anther man's house, or in an upper chamber. Stone 124. Keeping on ship board, is keeping bouse, Stone 123. So

creditors, except for just and necessary cause, is likewise construed to be an intention to defraud his creditors, by avoiding the process of the law (a).

If a tradefman conceals himself, or abfcon Is within his house, with design to delay or defraud his creditors, it makes him bankrupt (b), though the concealment be

only for a little time.

Keeping house to avoid an attachment. for not delivery of goods, no debt being due, is not an act of bankruptcy (c); but otherwise, for fear of an attachment in chancery (d).

If a man denies (e) himself, when he knows that a creditor comes for his debt, he will be

bankrupt (f).

is a miller's keeping in his mill, or a churchwarden in the church, Com. Dig. 523.

(a) 2 Black. Com. 478. (b) Palm. 325. 2 Show. Rep. 523.

(c) Atk. Rep. 196. pl. 102. (d) Atk. Rep. 240. pl. 131.

(e) Lord chancellor Talbot faid, that a debtor's denying himself to a creditor by note payable at a future day was not an act of bankruptcy; it must be a keeping house, &c. in order to deseat or delay creditors of their debts, which could not be in the present case, because the creditor had then no debt due to demand. 7 Vin. Abr. 61. pl. 14. And lord chancellor Hardwicke declared, that a person's denying himself to a creditor who called at 11 o'clock at night, was no act of bankruptcy : for it could not be faid to be done with an intent to defraud his ereditors, which is the ingredient the acts of parliament require to make a man bankrupt. Aik. Rep. 201. pl. 104.

(f) Com. Dig. 523.

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The denial of the party must be with an intent to delay (a) creditors, therefore, being denied when (b) sick in bed, or engaged in company, would be no act of bankruptcy (c); and L. C. J. Lee held the same, where the denial was by (d) agreement, in order (e) to take out a commission (f).

If a trader, upon notice of process issued forth against him, keeps his house to secure himself from arrest, and after goeth forth again, and then, upon like notice, keeps his house, and then again goeth forth; this bring-

(a) It must be proved that the person to whom the party was denied was a creditor, for which purpose it is necessary to name him, by Lee Ch. Just. at Guildball. Jackman v. Nightingale. East. 13 Geo. 2. B. R. Tri. at Ni. Pri. 38. S. C. S. P. in totidem werbis. Being denied to one who came on behalf of a creditor, is not sufficient By Camden Ch. Just. C. B. on a trial at Norwich assignees, in an action of Trover, brought by the assignees of a bankrupt.

(b) If a trader orders himself to be denied, circumflances may shew that he did not do it to avoid payment, but on account of fickness or particular business. Bur.

Rep. 484.

(c) Tri. at Ni. Pri. 38. S. P. in totidem werbis.

(d) But the late Mr. justice Foster held it a sufficient proof of an act of bankruptcy; the fact proved was, that the party, in consequence of an agreement made at a meeting of the creditors two hours before, (at which he and the plaintiff were both present) was denied to the plaintiff's clerk who was sent to demand money. At Guildball. Bromley v. Mundee. 2 June 1756. B. R. Triat Ni. Pri. 38. S. C. S. P. in totidem werbis.

(e) Field v. Bellamy. H lary 15 Geo. 2. B. R. (f) Tri. at Ni. Pri. 38. S. P. in totidem werbis.

because he uses to go at large, and his policy will not always prevent the serving of process on him, for he may be met withal

unwittingly one time or other (a).

The question in the court of Common Pleas was, whether a person, who had been arrested. and whose word the sheriff's officer had taken to put in bail, kept at home, and declared he did fo keep at bome, to avoid the consequence of the former arrest, had by this conduct committed an act of bankruptcy or not? The (b) court was of opinion that he had; the intent (said the court) to defraud his creditors would not have been sufficient to make this man a bankrupt without doing the act, i. e. keeping at home, but he kept house, and declared with what intent; the intent need not be put in execution, the question is quo animo he kept house, he himself did the overtact, and declared his intent.

If a man commits a plain (c) act of bankruptcy, as keeping house, &c. though he after goes abroad, and is a great dealer, yet

(b) Barnes 160.

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<sup>(</sup>a) Cr. Eliz. 12. pl. 6. quere tamen, for is not this delaying the creditor? And see sol. 34, 35.

<sup>(</sup>c) If after a plain act of bankruptcy committed, he pays off, or compounds with all his creditors, he is become a new man. Tri. at Ni. Pri. 38. S. P. in totidem wrbis Salk. 110. pl. 6. Cas. temp. Holt Ch. Just. 95. pl. 5.

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that will not (a) purge the first (b) all of bankruptcy (c). See 9. "Departing from bis "dwelling bouse." fol. 44.

### 4. Absenting (d).

If a man absents himself for felony, it is an act of bankruptcy, if his creditors, are thereby delayed of their just debts, otherwise not (e<sub>1</sub>.

Absenting for fear of being arrested by a cap. de excom. cap. will not make a man bank-rupt (f); but

Absenting for fear of being arrested by an attachment out of chancery for non-payment of (g) money decreed, makes him bank-rupt (b).

If a man has no constant dwelling, if he

(a) No act of bankruptcy can be purged but by obtaining a certificate. So faid by counsel. Bur. Rep. 474. 2 Black. Com. 485, 486. So faid by lord Talber, Cas. temp. Talb. 244. 2 Kel. 239. pl. 191.

(b) But if the first att was not plain but doubtful, then going abroad and trading will be an evidence to explain the intent of the first att, for if it was not done to defrand creditors, and to keep out of the way, it will not be within the statutes. Salk. 110. pl. 6. Cas. temp. Holt C. J. 95. pl. 5:

(c) Salk. 110. pt. 6. Caf. temp. H.h. C. J. 95. pl. 5.

(d) Stat. 13 El c. 7. S.1. 1 Jac c. 15. S. 2. (e) See 1. " Departing the realm." [ol. 35.

(f) Com. Dig. 523.

(g) But it does not, if it were for not making a conveyance. Billingb. 92. pl. 13.

(b) Com. Dig. 523.

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A merchant indebted departs the realm to merchandize, and having loss by tempest returns no more, this is not a departing, but an absenting himself (b). For more of absenting see 3. "Beginning to keep bouse." fol. 37.

# 5. Taking Sanctuary (c).

Taking fanctuary is, when a person takes refuge in any place, in which the law cannot be so readily executed upon him, and to delay the payment of his debts to his creditors, viz. within the verge of the court, or in any other particular place of refuge: but it seems that where a person hath lived and resided within the verge of the court many years together, that such residence cannot be deemed an act of bankruptcy, notwithstanding a person so resident has been declared bankrupt, and the commission has even appeared in the Gazette.

6. Willingly or fraudulently procuring bimself to be arrested (c).

Suffering himself to be arrested, without just and lawful cause, is likewise deemed an

attempt

<sup>(</sup>a) Com. Dig. 523.

<sup>(</sup>b) Stone 123, 124.

<sup>(</sup>c) Stat. 13 El. c. 7. S. 1. 1 Jac. c. 15. S. 2.

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attempt to defraud his creditors (a); and therefore, if he becomes a prisoner in the Fleet or Marshalsea, he will be bankrupt (b). Or if he causes a voluntary, or seigned (c) action to be commenced against him (d). So, where the party procures himself to be arrested upon a sham debt, that by the statute of Elizabeth, is immediately an act of bankrupt (e).

# 7. Suffering bimself to be outlawed (f).

But an outlawry in Ireland does not make one bankrupt (g), nor an outlawry here, unless it be with intent to defraud creditors, as it seemeth (b), or, if it be reversed before the commission issues; or for default of proclamations after the commission (i).

(a) z Black. Com. 478.

(b) Com. Dig. 523.

(c) As at the suit of a friendly plaintiss, in order to be turned over from one prison to another; for this being mere form, the bail never justify; per lord Mansfield; Bur. Rep. 439.

(d) Com. Dig. 523.

(f) Stat. 13 El. c.7. S. 1. 1 Jac. C. 15. S. 2.

(g) Com. Dig. 524. but in the county palatine of Durbam it does. Stone 124. Billingh. 94, 95. Good. 23.

(b) Lev. Rep. 13. Keb. Rep. 11. pl. 25. 2 Sid. 69.

(i) Com. Dig. 524.

# 8. Yielding bimself to prison (a).

This is to be intended a voluntary yielding, and not when a man is imprisoned for non-payment of a fine, or any refractory carriage; for although the act which causeth the imprisonment be voluntary, yet the imprison-

ment itself is involuntary (b).

B. was arrested for twenty-eight pounds, and though he had money sufficient to pay the debt, yet chose rather to go to prison, in order, as he declared, to force his creditors to come to a composition; and by lord chancellor Talbot this is an act of bankruptcy, within I fac. though without such intent yielding himself to prison was no act of bankruptcy, unless he lay there two months (c).

# 9. Departing from his dwelling house (d).

Lord (e) Mansfield said, if a trader leaves his house, circumstances may shew it was not

to abscond.

This was an action against the defendant for a false return to two fieri facias's, and on evidence the case appeared to be thus, viz. the plaintiff sent into Essex a writ on messe process, and a fieri facias against one Ward,

(b) Billingb. 95. Good. 25.

(e) Bur. Rep. 484.

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<sup>(</sup>a) Stat. 13 El. c. 7. S. 1. 1 Jac. c. 15. S. 2.

<sup>(</sup>d) Stat. 13 El. c. 7. S. 1. 1 Jac. c. 15. S. 2.

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and both writs were delivered to the fheriff. and Ward was arrested by virtue of the writ. about two hours before the fheriff took his goods in execution by means of the fieri facias; foon after that arreft, and before his goods were taken in execution, he was carried to Colchester to the officer's house, and defired the officers that they would not let any one know that he was there; and on being told the next day, which was Sunday, that Finch, one of his creditors, asked after him, he prayed, for God's fake, don't let him know that I am at your house; and upon Fineb's coming the next day to enquire after him, he then defired of the officers, that Finch might be permitted to fee him. In about a week after, the second fieri facias was executed on his goods; but the sheriff, supposing that he became bankrupt from his first arrest on the mesne process, delivered the effects to the affignees of the commission of bankruptcy taken out against Ward, and returned nulla bona to both the writs of fieri Upon hearing the evidence, Eyre, chief justice of the Common Pleas, ordered the act of king James 1. c. 15 fect. 2. which describes a bankrupt, to be read, and then faid, that between the time of executing the two writs of fieri facias, he had been guilty of an act of bankruptcy, for that he had withdrawn himself from the place of his habitation, and had absented; but serjeant Darnell saying,

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that that must be done with a design to defraud his creditors, the chief justice told him his very absenting himself was sufficient evidence of the fraud defigned. Then ferjeant Eyre faid, it must be a voluntary absenting. of himself, and not by means of an arrest; and the chief justice said so it was here, for that it appeared on evidence, (as indeed it did) that on the Monday after the arrest, he was discharged out of custody on the writ of mesne process; and from that time he secretly withdrew. Therefore the chief justice told the jury, that as here appeared not to be any act of bankruptcy committed by Ward till after the time of the first execution, upon that return they must find for the plaintiff, and that fince he had between the time of the two executions so behaved himself, as to make himself a bankrupt, by which the interest in his goods was vested in the asfignees; they ought on the last return to find for the defendant, which they did (a) ac-

On 28 November, Hall rode out of town, and returned in the evening, before which a bailiff had been at his shop to arrest him: the next morning he sent for the bailiff, and told him he went out in order to get the term of the plaintiff, and now the return of the

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(a) (b) (c)

<sup>(</sup>a) Philips & Peck v. sheriff of Essex, at the sittings in C.P. in London, after term, before Eyre ch. just.

writ was out, if they would take out a new writ he would give bail, which was done accordingly. And this was held to be an act of bankruptcy within 1 Jac. 1. c. 15. fect. 2. which speaks of " departing from bis bouse with intent, and whereby his creditors may be " defeated or delayed from recovering their just " (a) debis."

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Lord chief justice Willes was of opinion, that a person's absconding to avoid an attachment upon an award for non-delivery of goods pursuant to the award, was not an act of bankruptcy, because it was not within the words of the statute of 1 Jac. c. 15. s. 2. which makes it an act of bankruptcy in a person to depart from his dwelling-house, in order to avoid the payment of a just and true debt only, and not the delivery of goods, for that is a daty only; and lord chancellor (b) Hardwicke declared, that he thought the determination of lord chief justice Willes a very right one, and that he was very well warranted by the words of the statute, in the distinction he made between absconding to avoid a debt, and absconding to avoid a duty only.

- 10. Willingly or fraudulently procuring bis goods, money, or chattles to be attached or fequestered (c).
  - (a) 2 Stra. 809.
  - (b) Atk. Rep. 196. pl. 102.
  - (c) Stat. 1 Jac. c. 15. f. 2.

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Suffering this to be done by any legal process, is another plain and direct endeavour to disappoint his creditors of their securi-

ty (a).

But he is not a bankrupt if his goods are attached, or sequestered without his procurement; as, upon an attachment out of a court for his default, or laches; so, if A. has a rectory impropriate, and the tythes are sequestered for not repairing the chancel (b).

## of his lands or chattles (c).

Making such a grant, &c. to a friend, or fecret trustee, of his tenements or goods, is an act of the same suspicious nature as the

last (d).

And therefore, if he makes a grant, or conveyance fraudulent within (e) stat. 13 El. c. 5. or stat. 27 El. c. 4. it makes him bankrupt (f), and if he makes a fraudulent grant, &c. he will be bankrupt, though he afterwards appears publicly upon the exchange, &c. (g).

(a) 2 Black. Com. 478.

(b) Com. Dig. 523.

(c) Stat. 1 Jac. c. 15. f. 2. See Aik. Rep. 241.

(d) 2 Black. Com. 478.

(e) See what conveyances are fraudulent within these statutes, in 2 Com. Dig. 461, 462. Ves. Rep. 280.

(f) Com. Dig. 525. (g) Com. Dig. 525. but Hut. 42. 43. seems contra.

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A conveyance by a trader of his whole fubstance, to a particular creditor, himself continuing in possession, and acting as visible owner; though the conveyance be made by way of security, and for valuable consideration, is fraudulent and a specific act of bank-

ruptcy, within the above clause (a).

If a bankrupt might convey all to a favourite and friendly creditor, just before committing an act of bankruptcy, the whole power of felling his effects, calling in his debts, and fettling his accompts, must be in such single and particular creditor; he must have a right even to the custody of the books and papers; whereby the worst and most dangerous priority would prevail, depending merely upon the unjust or corrupt partiality of the bankrupt (b).

Such preference (c) is a fraud upon the whole bankrupt law, and would defeat the two main objects it has in view; to wit, the management (d) of the bankrupt's estate,

(a) By Lord Mansfield. Bur. Rep. 484. 2 Bur. Rep. 829.

(b) By Lord Mansfield. Bur Rep. 477.

(è) A Trader, even before bankruptcy, cannot preference or more creditor or creditors to the rest by a conveyance of his whole estate and essents. So said by lord Mansfield. Bur. Rep. 484. 2 Bur. Rep. 829.

(d) The law gives the management to persons chosenby the creditors, under the direction of commissioners, and the controll of the great seal. By lord Mansfield. Bur. Rep. 476. and an equal (a) distribution among his cre-

ditors (b).

A case happened, where a conveyance calculated to postpone one creditor to the rest. was held an act of bankruptcy. It came on before lord Hardwicke the late lord chancellor, at Lincoln's-Inn Hall, 31ft July, 1755. One Gayner, a trader, had made an affignment on the 7th of June 1755, of all his effects, goods, stock in trade, and book debts, (except houshold goods, watches, plate, bills of exchange, inland bills, promifory notes, and cash then by him) to trustees, in trust to pay themselves and all the rest of his creditors, except Ford the petitioner. But the trustees declined to act under this assignment. He executed another, on the 9th of June 1755, wherein the trustees were to pay themfelves, and all the creditors mentioned in a fchedule; (in which schedule, the petitioner was not included:) and in this fecond affignment, a large parcel of ginger, as well as the things abovementioned, were excepted.

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<sup>(</sup>a) An equal distribution among creditors, who equally gave a general personal credit to the bankrupt, anxiously provided for ever since the act of 21 Jac. c. 19. By lord Manssild. Bur. Rep. 477. Lord Hardwicke often delivered himself to the same effect. See Ask. Rep. 183. 229. 233. By the legislature, 5 Geo. 2. c. 30. s. 24.

<sup>(</sup>b) By lord Mansfield. Bur. Rep. 476.

Ford infifted that he alone could chuse asfignees; fince the other creditors claimed under the affignment.

Lord Hardwicke was clear, " that the ex-" ecuting the deed on the 9th of June was " an act of bankruptcy." And all that heard his determination, were of the same opinion: and every body concerned acquiesced in it. Whereupon the creditors mentioned in the schedule, consented to wave all benefit or advantage under that affignment; and all proved their debts, in order to receive an equal dividend with Ford: and the creditors proceeded to a choice of new affignees.

The framers of this deed executed by Gayner, took for granted, " that if it had been " a conveyance of all his effects, it must be " (a) bad;" and therefore they colourably (b) excepted parts. But the contrivance did not prevail, even fo far as to bear an argument; or to be thought by any body worthy of a trial.

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There is a great difference between the conveyance of all, and of a part, a conveyance of a part may be public, fair and honest; as a trader may fell, so he may openly transfer many kinds of property, by way of fecurity. But a conveyance of all, must either be frau-

(6) By Lord Mansfield. 2 Bur. Rep. 832.

<sup>(</sup>a) By Lord Mansfield. Bur. Rep. 484. 2 Bur. Rep.

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dulently kept secret, or produce an imme-

diate absolute bankruptcy.

It has been argued, "that after a resolution taken by a trader, to commit an act of bankruptcy, the trader so resolving to become bankrupt, might lawfully prefer a just creditor by conveying part of his effects, to

fatisfy that creditor's debt.

It is not necessary to determine that question, in this cause; for here the conveyance is of all: and therefore lord (a) Mansfield would only say, that no such proposition was yet established; much less, in the extent whereto it had been urged; but he said (b) afterwards, that a trader might pay a particular creditor, or he might mortgage a part of his estate or essects (at least) to a particular creditor, provided he delivered possession at the same time.

L. (c) a trader, being really indebted to W. (in about 1840 £.) fent for W; told him "he could not stand his ground," and proposed to secure him. Accordingly, he executed a general assignment to W. of every thing that he had in the world; but after payment of W's debts, it was to be in trust for L. himself, as to the residue. A deseazance in a separate deed, was soon after ex-

(a) Bur. Rep. 477. 478.

(c) 2 Bur. Rep. 827.

ecuted,

<sup>(</sup>b) Bur. Rep. 484. 2 Bur. Rep. 831.

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ecuted, making the affignment void, upon payment of all the money due to W. (who had been concerned with L. in circulating notes, many of which were out flanding :) but neither the assignment nor deseazance particularly liquidated how much money was due from L. to W. The deed of affignment recited L's being " obliged, upon urgent " and necessary business, to leave London; " and that he could not raise money soon " enough to answer all the demands that W. " had upon him." There was no counter part of this deed: and the original remained in the keeping of L. the affignor. No possesfion was delivered: only L. gave a letter of attorney to B. his own clerk, (a person privy to the whole,) to collect, receive, dispose, &c. the goods still continuing in L's house. No notice was given to L's debtors, it was resolved by the court of king's bench, that this deed alone was itself an act of bankruptcy. That it was within 21 Jac. c. 19. f. 2. and, if permitted would defeat the whole fystem of the bankrupt (a) laws. That the circumstances confirmed this: particularly, there being no visible change of possession, a secret transaction, no (b) notice, &c.

Every transfer of property, by an infolvent debtor, to one not a creditor, though

(b) By Lord Mansfield. 2 Bur. Rep. 830.

<sup>(</sup>a) By Lord Mansfield. Bur. Rep. 467. 2 Bur. Rep. \$29.

for valuable confideration, unless in trust for creditors, is an act of bankruptcy, within this clause of the statute.

12. Obtaining any protection (otherwise than being lawfully protected by privilege of parliament) (a).

Procuring any protection, not being himfelf privileged by parliament, in order to fereen his person from arrests, is also an endeavour to elude the justice of the law (b).

But if any one be protected as the king's fervant, it does not make him bankrupt (c).

No (d) merchant or trader whatsoever, within the description of the statutes against bankrupts, who shall put himself into the service of an ambassador, or public minister, shall have any privilege (e).

It feems, therefore, that a person's (f) procuring himself the protection of an ambassa-

(a) Stat. 21 Jac. C 19. f. 2.

(b) 2 Black. Com: 478

(c) Refolved in Skin. 21. pl. 21.

(d) Lord chancellor Talbor faid, that the exception of persons trading relates only to the servants of ambassadors, the parliament never imagining that the miniflers themselves would trade. Cas. Temp. Talb. 282.

(e) Stat. 7 An. c. 12. f. 5.

(i) That is one who is otherwise liable to a commission, as to the quantity and nature of the demand and trading.

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dor, or public minister, is an act of bankruptcy, within the above clause of stat. 21 Jac. as it defeats or delays creditors, or tends so to do.

13. Preferring unto his majesty, or unto any of the king's courts, any petition or hill against his creditors, or any of them, thereby defiring or endeavouring to compel them to accept less than their just and principal debts, or to procure longer [more] days of payment, than was given at the time of their original contracts (a).

These are an acknowledgment either of his

poverty or his knavery (b).

But if the creditors, upon request, enlarge the time for payment, it does not make the party bankrupt (c).

But these fort of petitions or bills will (d)

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14. Being arrested for debt, after bis arrest, lying in prison two months upon that, or any other arrest or detension for debt (e).

The inability to find bail, in order to obtain his liberty, argues (f) a strong defici-

(b) 2 Black. Com. 478.

(c) Com. Dig. 524.

(d) By lord keeper Jeffries. Vern. 153.

(e) Stat. 1 Jac. c. 15. f. 2. 21 Jac. c. 19. f. 21

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<sup>(</sup>a) Stat. 21 Jac. c. 19. f. 2.

<sup>(</sup>f) So said by Mr. justice Wilmot, (now L. C. J. C. B.) 2 Bur. Rep. 819.

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ency in his credit, owing either to his suspected poverty, or ill character; and his (a) neglect to do it, if able, can arise only from a fraudulent intention; in either of which cases it is high time for his creditors to look to themselves, and compel a distribution of his effects.

Billingburst (b) seems to be of opinion. that if a person lies in prison two months on an arrest upon a bond before the Day of payment, in order to oblige him to find fureties, according to the custom of (c) London, that he will have committed the act of bankruptcy specified in this clause of the stat. of 21 Jac. But Mr. Serjeant (d) Goodinge feems (e) doubtful, for (fays he) though it be debitem in præsenti, and so a release of all debts, will (f) bar it, yet it is not properly a debt within the words or intent of the statute, for that must be such a debt, for which a cause of action is given, and there can be no cause of action properly, till the forfeiture; for the (g) obligation is guided by the condition,

(a) 2 Black. Com. 478, 479.

(c) Ventr. 29. 8 Rep. 126 a. Hob. 86. (d) Law against bankrupts, 26.

(f) Cro. Fac. 300. pl. 4.

<sup>(</sup>b) Judges resolutions on the bankrupt statutes, 96.

<sup>(</sup>e) And therefore the serjeant submits his reasons to the judicious reader.

<sup>(</sup>g) Lord Hardwicke, on another occasion, said, the penalty in an obligation was debitum in prasenti, and the condition only suspended it, so that it was looked

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ed d and the custom of London will not help it; for the custom is not that the Party shall be arrested for payment of the money, but to find better sureties; and the statute only intendsdetension in prison for a just (a) debt, really due.

- We entirely agree with the serjeant, and further, that the customs of the city of London cannot be taken notice of, even by the superior courts at Westminster judicially, unless they be (b) certified by the recorder Ore

upon as a debt from the time of the execution of the

bond. Atk Rep. 114.

(a) The ferjeant conceives the meaning of this tobe for debt originally; and not debt by reason of a fine
imposed, &c. for the statute hath respect to creditors
either by way of contract, exchanging, buying, &c.
and not fines or amerciaments, &c. which no way respect trade. Good. 25. and Billingburs scems to think
that a fine judicially imposed for some contempt is not
within the meaning of the acts, which were made for
the relief of creditors only, who had intrusted the
party offending. Billingb. 95.

(b) The judges in Westminster-hall cannot take notice of the customs of the city, unless certified. So said by Mr. Justice Denison, on his delivering the opinion of the court, in the cause of Harrison, chamberlain of London, v. Alexander, one, &c. 180. Those proceedings are well worth the perusal of every gentleman in the profession, for the arguments are accurately and judiciously taken; but the opinion of Mr. Justice Denison seems to admit of some degree of limitation, for the distinction laid down is this: If a judgment be given in London, and it comes into the King's Bench, that court ought to take notice of the customs of London, because in the city courts, it is not necessary to alledge

tenus; much less then can the commissioners of bankrupts take notice of them without such certificate.

Lord (a) Talbot (after mentioning the (b) laws whereby persons having bills, bonds, promisory notes, or other personal security for their money payable at a suture day, are enabled to prove their debts under commissions of bankrupt, and also to petition for, or join in petitioning for, the same) was of opinion, that the debtor's denying himself to such persons was not an act of bankruptcy; it must be in order to deseat or delay creditors of their debts, which could not be here, because such persons had then no debt due to demand.

pounds, and be arrested for it, and lie in prison two months, this makes him bank-rupt, which the (s) serjeant thinks is durus sermo.

the customs, and therefore if the court of King's Bench did not take notice of them, they would reverse a judgment without reason But if a custom be in another place than London, the King's Bench will not take notice of it, in the original action in their court, unless it be alledged. Rol. Rep. 106. See 2 Str. 1187. Fortesc. Rep. 347. 3 Atk. Rep. 44. pl. 18.

(a) 7 Vin. Abr. 61. pl. 14. See Aik. Rep. 196. pl.

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(b) Stat. 7 Geo. c. 31. 5 Geo. 2. c. 30. s. 22. (c) Good. 25.

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Where bail is really put in, the bankruptcy only relates to the time of (a) furrender, the most substantial trader is liable to be arrested, and the mere being arrested is no prefumption of insolvency; the presumption from his lying in prison two (b) months, without being able to get bail, is a very strong one; bailing in order to turn the defendant over from one custody to another is mere form; the bail never (c) justify; and upon cases of superseding actions by reason of the plaintist's not proceeding upon them within two terms, being merely turned over

(a) A. being arrested puts in bail, afterwards he surrenders in discharge of his bail, and lies above two months in prison, he is bankrupt only from the time of his surender, not from the time of his arrest. Resolved unanimously; Tribe v. Webber. Hilary, 17 Geo. 2. See S. P. in Bur. Rep. 438. 2 Bur. Rep. 815. Tri. at Ni. Pri. 37. The best man upon the Exchange may be arrested and put in bail, and afterwards become poor, and so be forced to surrender himself to save his bail, and it would be hard to construe him a hankrupt from the first arrest, when he was able. 2 Show. Rep. 254.

(b) Lying in prison two lunar months, makes the party bankrupt from the first arrest, and although the commission was taken out before the two months were expired, yet he appearing to be bankrupt by relation to a time before the suing it out, it was been sufficient. Adjudged by L. C. J. Raymond. Brawes's Lex Mercat. rediviv. 489. Lord Hardwicke said, that the word months" in an act of parliament, mean "lunar."

3 Atk. Rep. 346.

(c) By lord Mansfield. Bur. Rep. 439.

from one custody to another, is always confidered as a continuance of the same imprisonment, and the bankruptcy has relation to the first (a) arrest.

This act of bankruptcy feems subservient

to very bad purposes, as for instance ::

Suppose a man of an iniquitous disposition, forms a scheme of getting into his possession, the estate and effects of a third person; he makes a false affidavit of a considerable debt. and procures the defendant to be arrested on a writ, returnable the last return of Trinity term, he contrives that the party (who, innocent and ignorant of the proceedings, is easily laid hold of) be taken so short a time before the return of the writ, that he is not able to fettle his accompts, and convince his friends of the injustice of the demand; for as to put in bail to the sheriff, before all the Superior courts at Westminster are up for the vacation. Being thus precluded, therefore, of justifying his bail in court, the plaintiff's attorney refuses to accept a justification thereof at a judge's chambers, by this means the defendant is compelled to lie in prison till the next Michaelmas term; in the interim, (two months having elapsed) the defendant has committed an act of bankruptcy, by lying in prison two months. The perjured

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<sup>(</sup>c) By lord Mansfield. Bur. Rep. 439, 440. By L. C. J. Wilmot. 2 Bur. Rep. 819. Bul. Ni. Pri. 39. S. P.

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plaintiff becomes now the perjured petitioning creditor, and, in order to carry on this horrid scheme, we presume he will not find it difficult to provide one more person, as infamous as himfelf, to fwear to the trading, (a) and the act of bankruptcy; and that he may have immediate possession of the unfortunate person's all, an assignment is executed to him at the first meeting, which is always a private one; and in order more fecurely and effectually to complete his villainy, the commission may be opened on a Tuesday, whereby it cannot be publicly known, till Saturday or Monday perhaps; thus the pretended creditor has a week to conficate the effects: and where do you think to find any of the parties criminally concerned, by the time a profecution can be commenced?

In order to remedy this inconvenience let a law pass, that a compulsive act of bankruptcy shall not for the future be deemed a valid one, and that the defendant instead of justifying his bail in court, (where it cannot be done in time) shall be at liberty, within two months

<sup>(</sup>a) If the commissioners would insist on the trading, the act of bankruptcy, and the petitioning creditor's debt, being proved by three different persons, it would be a great means towards, if not totally prevent these iniquitous proceedings; and we apprehend the commissioners would be justified in so doing, because it is laid down, that the creditor of a bankrupt is no legal witness. See 12 Vin. Abr. 11. pl. 28 But quere whether this must not be understood as a trial at law only.

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after the return of the writ (a), to enter into a bond in fuch Sum and with two fuch fufficient fureties as any of the judges of that court, out of which the writ iffues, shall approve of, to pay the debt and costs when le. gally recovered; and that in case the defen. dant shall neglect to enter into the bond, within the time aforesaid, that such neglect shall be an act of bankruptcy, and shall relate (as in other cases) to the time of the first arrest; by this means a just debt will be fecured, and an unjust one detected.

15. Being arrested for one bundred pounds or more, of just debt, after such arrest, escaping out of prison (b).

No man would break prison, that was able and defirous to procure bail, which brings it within the reason of the last case (c).

Lord Mansfield held that a person's being permitted, at his own defire, to go out of the county, in which he was arrested, was not fuch an escape, as that he should be thereby rendered a bankrupt and a criminal; for the act clearly intended fuch an escape made by a prisoner, as shewed that he meant to run away, and thereby defeat his creditors; but that this was not fuch an escape, and that

certainly

<sup>(</sup>a) See flat. 4 Geo. 3. c. 33.

<sup>(</sup>b) Stat. 21 Jac. c. 19. f. 2.

<sup>(</sup>c) 2 Black. Com. 479.

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certainly a man should not be made a criminal, where he had not the least criminal intension to disobey any law whatsoever. That it was no (a) escape at all in the sense of the act of (b) parliament; he remained substantially in custody, notwithstanding his being carried into another (c) county.

16. Paying to the petitioning (d) creditor, or delivering to him goods or fecurity for his

(a) Wilmot (L. C. J. C. B.) laid it down, that the aft which renders a bankrupt a criminal, must mean an escape against the consent of the sheriff; a running away, and breaking his prison. Bur. Rep. 440. It is observable, that even L. C. J. Wilmot cites the clause of a statute on this occasion which was repealed near 50 years before; for lord chancellor Hardwicke said, that one of the descriptions to constitute a bankruptcy, was suing out an original writ, &c. Another, an arrest, and procuring common or bired bail, &c. that these being found inconvenient gave rise to the clause of 10 An. c. 15. See 4. "What alls of bankruptcy are repealed." fol. 66.

(6) Stat. 21 Jac. c. 19. f. 2.

(c) Bur. Rep. 439.

(d) And the receipt of such goods or other satisfaction, shall be a forfeiture as well of his whole debt, as of the whole he shall have received, and the same shall be paid back and delivered up, or the sull value thereof, to be divided amongst the other creditors; and such commission shall be superfeded; and it shall be lawful for the lord chancellor to award to any creditor petitioning, another commission. Stat 5 Geo. 2. c. 30. s. 24. This provision was to prevent knavish combinations between the creditors and bankrupt, in order to obtain the benefit of a commission. 2 Back. Com. 480.

debt.

more in the pound, than the other credi-

tors (a).

Nothing can explain this act of bankruptcy, better than the legislatute has, in the preamble of the above clause of the statute; the words are:

" Whereas commissions of bankrupt are frequently taken out by persons who by means of fuch commissions (on a composition proposed by the bankrupts) and on promise not to execute the same, prevail with and extort from the bankrupt their whole debts, or much greater part thereof than fuch bankrupts pay to their [other] creditors, or otherwise get from fuch bankrupts, goods or other real or personal security, which is contrary to the true intent and meaning of the feveral flatutes made concerning bankrupts, which faid statutes intend, that all fuch bankrupt's creditors shall be on an equal foot, and not one preferred before another, or paid more than another, in respect of his or her debt (f)."

17. Neglecting to make satisfaction for any just debt to the amount of one bundred pounds, within two months after service of legal

(a) Stat. 5 Geo. 2. c. 30. f. 24. (b) Preamble to Stat. 5 Geo. 2. c. 30. f. 24Chap.

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process, for such debt, upon any trader baving privilege of parliament (a).

Hear the legislature's reasons for declaring this to be an act of brokruptcy, viz. "To (b) support the bonour and dignity of parliament, and good faith and credit in commercial dealings which require that in cases of bankruptcy the laws should have their due course, and that no merchants, bankers, brokers, sactors, scriveners, or traders, within the description of the statutes relating to bankrupts, having privilege of parliament, in case of assual insolvency, should, by any privilege whatever, be exempted, from doing equal justice to all their creditors."

But in order to make this a perfect and complete act of bankruptcy, it is necessary for a creditor (c) to make and file on record, in one of the courts at Westminster, an affidavit that the debt is justly due to him, and that his debtor, as he verily believes, is a merchant, &c. within the description of the

statutes, relative to bankrupts (d).

(a) Stat. 4 Geo. 3. c. 33. f. 1.

(b) The declaration of parliament in the preamble to

Stat. 4 Geo. 3. c. 33. f. 1.

(c) For the sufficiency of his demand for this purpose, see "debt of the petitioning creditor. fol. 68.

(d) Stat. 4 Geo. 3. c. 33. f. 1.

## 3. Evidence of alls of bankruptcy.

A man cannot be an evidence to prove an act of bankruptcy committed by himself (a); but may be admitted to give evidence as to the time (b) of the act of bankruptcy (c), his confession to a third person, that he had gone out of the way, to avoid being arrested, is evidence (d).

A creditor of the party is no legal (e) witness to prove either the act of bankruptcy or the trading; but this must be understood

on a trial at law only.

## 4. What alts of bankruptcy are repealed.

The following (f) acts of bankruptcy are (g) repealed, viz. Being indebted in 100 f.

- (a) So said by lord Hardwicke, ch. just. in Evans v. Gould. Hil. 8 Geo. 2. 2 Stra. 829. 12 Vin. Abr. 11. pl. 28. S. P. Tri. at Ni. Pri. 38. S. C. S. P. in totidim

verbis, Caf. Temp. Hardw. 267.

(b) So a verdict upon an issue directed out of chareery, to which only one of the defendants was party, may be received against all the defendants, to prove the time of the act of bankruptcy. Leyfold v. Banscroft. By lord Raymond ch. just. S. C. & S. P. in Tri. at Ni. Pri. 38 in totidem verbis.

(c) By lord Raymond ch. just. 12 Vin. Abr. 28.

(d) Evans v. Gould.

(e) See our note (a) in fol. 61.

(f) They were acts of bankruptcy by stat. 21 Jac.

C. 19.

(g) By flat. 10 An. c. 15. f. 1. Because it had been found by experience (says the preamble to this statute)

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or more, and not paying or compounding for the same, within (a) six months next after the same grew due, and the debtor arrested for the same, or within six months after an original writ sued out to recover the said debt, and notice thereof given to the party or left for him in writing, &c. at his house or last

that many and great mischiefs and inconveniencies had happened, especially of late, to trade and credit in general, by reason of the said descriptions of a bankrupt. Lord Hardwicke doubted whether this statute intended any more than to repeal some part of the statute of 21. ac. which constituted an act of bankruptcy; and not the description of the trade or occupation of the person against whom the commission issued; and that as all the bankrupt acts had the description of using the trade of merchandize, and getting his living by buying and felling, if the construction that stat. 10 An. repealed the description of the trade of the party, should prevail, the description of a bankrupt, by the expression of buying and felling, was as much repealed as the other. Confider (continued lord Hardwicke) how much is recited by this statute, not the whole description of a banktupt, or the general or common qualifications of the person of a bankrupt, or his buying and selling, &c. If such a construction was right, then all the other acts of parliament would be repealed. It is only particular alls of bankruptcy, which are made void, and not the qualification of the person; and he had no doubt himfelf, but that the construction he had put upon this repealing statute, was the proper and only safe construction. Atk. Rep. 142.

(a) This act of bankruptcy is now revived again, as to members of parliament, except only that it is two and not fix months, and that the writ must be served personally, and not left at the party's house, by stat.

4 Geo. 3. c. 43.

place of abode; or being arrested for 100 for more of just debts, at any time after such arrest, procuring his enlargement by putting in common or hired (a) bail.

3. The debt of petitioning (b) creditor.

No commission of bankrupt (to prevent the taking them out (c) maliciously) shall issue, unless the single debt of one creditor, or of more persons, being partners, petitioning for the same, amounts to one hundred pounds, or unless the debt of two creditors petitioning, amount to one hundred and sifty pounds; or unless the debt of more creditors petitioning amount to two hundred pounds; and the creditors petitioning shall, before the same be granted, make affidavit, or solemn affirmation, before one of the masters in chancery, of the truth of their debts (d).

(a) It is observable, that even lord chief justice Wilmot cited this clause in the court of king's bench, so late as Hilary term, 31 Geo. 2. (Bur. Rep. 440.) when it

had then been repealed near fifty years.

(b) Lord Hardwicke said, that a creditor was not wantonly to take out a commission against a debtor, unless it was upon a plain and express act of bankruptcy, Atk. Rep. 139. pl. 80. and that he had not the same election as a common creditor, for by the very petition, he hath made his election. Atk. Rep. 83. and that if he was to proceed at law, it would supersede the commission. Atk. Rep. 134. pl. 93.

(c) Preamble to Stat. 5 Geo. 2. c. 30. f. 23. 2 Black.

Com. 480.

(d) Stat. 5 Geo. 2. c. 30. f. 23.

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The law does not look upon persons, whose debts amount to less, to be traders considerable enough either to enjoy the benefit of the statutes themselves, or to intitle the creditors, for the benefit of public commerce, to demand the distribution of their effects (a).

The petitioning creditor's debt must be a legal (b) one, and therefore an assignee (c) of a bond cannot obtain a commission; nor must it be of above (d) six years standing (e)

The bankrupt petitioned to supersede the commission against him, because the petitioning creditor's debt arose only from a note that had been indorsed to him after the petitioner had committed an act of bankruptcy; but as it appeared that the note itself was given before (f) any act of bankruptcy, though

(a) 2 Black. Com. 475.

(b) If a debt in law is not made out, though ever so firong a case of a debt in equity, it will not be a soundation for a commission of bankruptcy, by lord chancellor Hardwicke. 2 Ves. Rep. 407. pl. 130.

(c) 2 Stra. 899. 2 Kel. 6. pl. 8. Wil. Rep. 783. -

Sel. Caf. of Evid. 161.

(d) Sel. Caf. of Evid. 148. 2 Stra. 746. contrary, are not law.

(e) Moseley 37.

(f) The debt of the petitioning creditor being a note from the bankrupt after he became bankrupt, lord Raymond was of opinion it was a void commission, the acts of a man after an act of bankruptcy being void. 2 Stra. 744. Cas. Temp. Talb. 243. 244. Sel. Cas. of Evid. 147. But where A. had 100 L. owing

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commission against his restator has been superseded, cannot take out a commission of
bankruptcy for a debt due to the restator,
for such debt vested in his assignees, and consugmently the executor mot entitled at law,
to be the petitioning crediton (r). The end

A petition to supersede the commission on a suggestion that Mr. Alfworth's debt was not of such a nature, as entitled him under the bankrupt acts to sue out a commission. Mr. Alsworth treated with the petitioner for the purchase of the equity of redemption of his estate, which was in mortgage to one Mr. Field Four hundred pounds was the price settled for the purchase, articles were signed,

on simple contract before an act of bankruptcy, and one is afterwards secretly committed, and then a bond taken, it shall not so far extinguish the simple contract, as to deprive the creditor of petitioning for a commission.

Cast Temp. 2 Strain 1042. Cast Temp. Hardw 267.

(a) Lord chancellor Macdesfield laid, it might be a question whether such indorfee would be entitled to a commission, as not being capable of taking out a commission, at the time of the party's becoming bankrupt.

(b) 44. Rep. 73. Pl. 271 id. 146. pl. 70. Will Rep. C. B. 13. S. P.

(c) By lord Hardwicke. Ack. Rep. 100. pl. 49.

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and Mr. Alfworth paid Hylliard 2511. 13. to clear off the mortgage, and was to pay him 1501. more on the execution of the conveyances. Hylliard refused to complete the purchase, or to pay off the mortgage. On this Mr. Alfworth brought an action for 2511. 13. against Hylliard, who was carried to gaol, where he lay two months; and thereupon Mr. Alfworth took out a commission of bankruptcy, and Hylliard was declared a bankrupt on this act of bankruptcy.

For the petitioner it was infifted, that this was not such a debt as was within the meaning of the bankrupt acts. That an indebitatus assumpt could not be maintained, for the 250 l. was a breach of trust only, and not a

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The other side insisted it was a debt, and money had and received to the bankrupt's use, and an action therefore maintainable as for his debt.

It was urged in the reply, that there was no pretence that the 150 l. or one penny thereof, was ever tendered to Hylliard, but was told that he must either repay the 250 l. 13. or go to gaol. No one creditor appeared under the commission; by that means Mr. Alsworth has, by virtue of chusing himself assignee, got into his possession all Hylliard's effects, although 'tis sworn he does not owe any person besides a farthing.

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Lord chancellor Hardwicke doubted extremely whether a commission could be taken out on fuch a contract, for the remedy should have been a bill for performance of the con. tract, and no action could, in strictness of law, be maintained. But if it stood simply upon this footing he should not have superfeded the commission but left the bankrupt to an action at law to try the bankruptcy. But as it came out now that Mr. Alfavorth has, fince the issuing of the commission, taken an affignment of this very mortgage, he would not fuffer the commission to go on; for as standing in the place of the mortgagee, he might hold till redeemed, and likewife compel a performance of the contract, or Hylliard to refund the 2511, 15. receipt given by Hylliard, is nothing but an acknowledgment of receiving 251 l. 1s. in part of the purchase money. No action in this case could be maintained, and therefore the very foundation for the commission failed; and Mr. Alfworth has, by taking an affignment of the mortgage, got the fecurity of the mortgage for the money he has paid. The affidavits on both sides swear, that the petitioning creditor faid, either pay me back the money, or convey to me the equity of redemption, and not a word of the petitioning creditor's offering to pay the 150 L the remainder of the purchase-money.

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The commission, therefore, was superseded, and the petitioning creditor ordered to pay the cost; for any expressions of Hylliard's, that he was able to live in gaol, or any where else, and such like, proceeded from this ill usage, and will not forfeit his costs (a).

It appearing on a trial at law in the court of Common Pleas, in an action of Trover brought by a bankrupt against his assignee, that the debt upon which the commission was taken out was due from the partnership. Lord chief justice Willes doubted, whether the commission issued regularly; and directed a verdict to be found for the plaintist, subject to the opinion of the court of Common Pleas; and after hearing counsel on the point reserved, the court of Common Pleas pronounced (b) judgment, and declared the commission issued regularly (c).

(a) Atk. Rep. 147. pl. 87.

(b) Lord chancellor Hardwicks said, that when this case came originally before him, he thought it a pretty new one; a commission of bankrupt taken out against one partner for a partnership debt, without joining theother partners in the commission; but whatever doubts he might have had before, it was now established to be law, on the unanimous opinion of the court of Common Pleas, that a commission of bankrupt may issue against one partner only for a joint debt; though to be sure an action at law could not be maintained against one partner, unless the other two were joined in it. Ack. Rep. 134.

An

An arbitration bond is a debt at law, and binds the parties till fet (a) aside for corruption or partiality, and is also a sufficient debt to support (b) commissions of bankruptcy.

Indorsee of notes of one who afterwards becomes bankrupt, purchased in at an under value, as at ten shillings in the pound, petitioned for a commission against the drawer. And lord chancellor *Macclesfield* held, that he was plainly a creditor, just as if the drawees had paid the bankrupt an under rate for them; and his lordship held, that though they had been given without any (c) consideration, yet they are now his debts, and the legal right vested in the (d) indorsee.

An order was made, that a folicitor's bill should be taxed by a master, and that all proceedings at law should, in the mean time, be stayed; and whilst the bill was under taxation, the solicitor sues out a commission of bankruptcy against his client; and on a petition to supersede the commission, this was adjudged to be no contempt, nor a sufficient

(b) By lord Hardwicke. Atk. Rep. 241.

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<sup>(</sup>a) And a bill brought for that purpose cannot be a foundation to suspend it, for if it was, a person then has nothing more to do but to file such a bill, and frustrate the effects of the award. Atk. Rep. 241.

<sup>(</sup>c) But the commissioners will not suffer such creditor at this day to prove his debt under a commission, unless he sets out and swears to the consideration of the indorsement.

<sup>(</sup>d) Wil. Rep. 782, 783.

cause to supersede the commission, because the order of reference extend only to bringing actions, and to common and ordinary (2) Dartiglitys proceedings.

Lord chancellor (b) Taliot faid, that where a debt was due to the wife as administratrix, the husband alone could not make oath of this as a debt due to himself in order for a

commission of bankrupt.

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Toms and Allen having recovered judgment against one Barnaby, he was surrendered by his bail, and then charged in execution, after which the plaintiffs in that action preferred their petition to the lord chancellor (c) King, as creditors, for a commission of bankruptcy, which iffued, but was superseded upon the bankrupt's petition; the chancellor being of opinion, that the body of the debtor being in execution, it was a fatisfaction of the debt in point of law, fo that they were not creditors who could petition.

Persons who have bills, bonds, promisory notes, or other personal security for their money, payable at a future day, who by flat. 7 Geo. c. 31. are enabled to come in as creditors, and allowed to discount such debts, allowing 5 per cent. &c. (d) may (though difabled by the statute) petition for, or join with

<sup>(</sup>a) Moldky et plant fine will not fur et bold (a) at this day to prove his debt at 16,78,767, 10 ...

<sup>(4)</sup> Sira: 653. Read. on Stat. Law, 189. (a) Stat 5 Geo. 2. c. 30. f. 22.

Debt of petitioning Constors Declaration of Bankruptcy, Chap, 1.

others an petitioning for accommission of bankrupt. oe petitioning creditors.

ble Biutradelmanu becomes fecurity for anotherd this is fuch debt that the creditor may take out a commission thereupon, because the debtor is trufted upon the reputation of his flack and dealings, as well where he is fecurityo as where he contracts for his own or is refused, though (e) Restead

bal Anbeing a trader, becomes indebted to Brin 100% and then he quits his trade, and afterwards becomes indebted to Bain 100 1. more, A afterwards pays to B. 100 L without faying upon what account. Holt, (b) chief justice, said, that since so much in quantity was paid to B. as was due to him from A. when A. was capable of being a bankrupt, it would be too rigorous to admit B. to fue out a commission of bankrupt for the old debt of 100 h. But to this point he faid, he would not give an absolute opinion, and none of the other judges contradicted it.

The obligee in a bail (c) bond, a joint (c) bond, an indemnity (c) bond, in a bottom (d) ree, or respondentia (d) bond, and the underwriters (d) in a policy of (d) insurance, may

a/ 2 Vef. Rep. 327.

petition for a commission.

(b) Lord Hardwick faid, that the vyspyimla (a)

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<sup>(</sup>b) Lord Raym. 217. 12 Mod. 359. Comb. 463. noned the particulars for which thezer min Posec(1)

<sup>(</sup>d) By flat. 7 Geo. c. 31 f. t. creditors on federities payable at a future day, may prove their debts thereon, Most

Most of the creditors mentioned in our alphabetical lift of them, in fol. 96, &c. may be petitioning creditors.

A debt on account, though not liquidated, is a (a) foundation for a commission of bankske out a commilium increupon, si

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Though by a late innovation (for it cannot be considered either a regulation or reformation) an office copy of the debt of the petitioning creditor is refused, though offered only for the mere purpose of grounding and supporting the commission; yet some of the commissioners will receive such copy, if (b) it contains the confideration of the demand, and dispense with the personal attendance of the

as if already due, and by flat. 5 Geo. 2. c. 30. f. 22. fuch creditors may petition for a commission; and it hath been held, that securities in faid ftatutes of 7 Geo. mean all forts of bonds, &c. for payment of money, (2 Stra. 1211. See 2 Barnard, K. B. 255.) By stat. 19 Geo. 2. c. 32. 1. 2. obligees in bottom-ree, or respondentia bonds, and bona fide affured in policies of insurance, may claim, and after loss or contingency, prove their debts under commissions, and as all the statutes concerning bankrupts, are to be taken together as making one fyftem of law, and by equity for relief of creditors (fee Pref. Dif. xi. xii.) fuch obligees and infurers, after less. or contingency, seem legally entitled to take out a commission, being confessedly creditors on bond for payment of money.

(a) 2 Vef. Rep. 327.

(b) Lord Hardwicke faid, that the affidavit on fuing out a commission was general, and that it never mentioned the particulars for which the bankrupt became indebted. Atk. Rep. 153. pl. 92.

petitioning creditor at opening the commiffion, whom, when he somes to prove his debt under the same (which he cannot legally do at a private meeting, or at any sitting, but at Guildball, held in pursuance of public notice), ford chancellor (c) Appley hath desired and recommended to the commissioners, to be careful to examine, as to the reality of his debt.

(a) See his lordship's order, dated 14 Feb. 1774.

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## CHAP. II.

The Seizure of the Bankrupt's estate, and Summonce for his Surrender.

for or officer by them deputed and appointed, by their warrant under their hands and feals, may break open the house, (b) chambers, shops, warehouses, doors, trunks, or chests of the bankrupt, where any of his goods or estate shall be, or reputed to be,

(a) Stat. 21 Jac. c. 19. f. 8.

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<sup>(</sup>b) But they cannot break open an house to search for the bankrupt's goods, unless it be the bankrupt's goods in the house of the bankrupt. 2 Show. Rep. 247. pl. 248.

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and leize (a) any of his goods, wares, merchandiles, this necessary wearing apparel, or of his wife or children, only excepted) and any of his books, papers, and writings, which shall be in his custody or possession.

Commissioners (b) of bankrupts issued their warrant to feize goods of a bankrupt, on board (c) twelve thips in Toplbam Bay in Devonsbire, the goods were configned to perfons in Holland, who had not paid the bankrupt for them; the mafters refused to deliver the goods, notwithstanding the warrant; and this occasioned the commissioners themselves to demand the goods in person, which were still refused.

Sir Peter (d) King moved for an order upon the mafters for their contempt. The court of chancery, at first greatly doubted whether they could make an order in aid and affiftance of the warrant of the commissioners of bankrupt, the statute having vested a large power in them; belides, the persons to whom the goods were configned, would be indebted to the creditors of the bankrupt, which creditors might recover by the law of Holland. But Sir Peter King faid they would

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<sup>(</sup>a) Stat. 5 Geo. 2. c. 30. 6 14.

<sup>(</sup>b) 2 Eq. Caf. Abr. 98. plant sonnas vanis at (a) [ Two thips. Mol. de Jure maritime. B. 2. C. 3. (a) Mol. de Jur. Marit. 363.

rather lose the goods, than follow them into Holland.

Lord chancellor Cowper. Their refusing to deliver the goods upon the warrant, is no contempt to this court, though the commiffioners act under a commission under the broad feal. I remember the queen was applied to, to lay an embargo upon a ship in the like case, but denied; because an embargo would have affected other goods in the ship. The masters in the present case have some colour to detain the goods; for upon a delivery of them, they may be disappointed of freight, and the affignees of the commission must stand in the same place as the bankrupt, and be subject to his contract. But, however, an order was made upon the masters to deliver the goods upon payment of the freight money, and the master to be indemnified by the creditors, against a bill of lading, which was fent to the confignees.

H. a filkman, and F. a dealer in coals, were partners in both trades; they afterwards dissolved the partnership, and F. gave H. a release of all demands, and took upon him the payment of the debts due from the coal trade, and H. the debts from the silk trade, and the respective debts were assigned accordingly; H. died, and a commission was taken out against F. and the messenger attempting to seize the effects of H. in the hands

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hands of his representative, was opposed and turned out of possession. Lord (a) Hardwicke was of opinion, that by virtue of the release from F. to H. the whole property of the silk trade from the dissolution of the partnership vested in H. and that the assignee could stand in no better light than F. himself, who had relinquished all his claim, and therefore that the goods of H. ought (b) not to have been seized at all under the commission against F.

within the forty-two (d) days, for the bankrupt to furrender, and to conform himself, not less than three meetings, the last of which

(a) Atk. Rep. 136. pl. 77.

(b) But though the taking of these goods by the messenger was illegal, yet the turning him out of possession by force could not be justified, for the owner of the goods ought to have afferted his right by a due course of law. By lord Hardwicke. Ack. Rep. 137.

(c) Stat. 5 Geo. 2. c. 30. f. 2.

(d) Bankrupt who does not within forty-two days after notice of a commission, being left at his usual place of abode, or personally served, if in prison, and interted in the Gazette, with the time and place of the meeting of the commissioners, surrender himself, and sign, surrender, and submit to be examined, and in all things conform to the several bankrupt slatutes (being thereof law fully convicted by judgment or information) shall suffer as a selon, without benefit of clergy, stat. 5 Geo. 2. C. 3. S. I. All offences made selony by this act, are excepted out of the last act of grace, or general pardon, 20 Geo. 2. C. 52. See our remarks on Parrott's Trial, sol.

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shall be on the forty-second (a) day, limited for such bankrupt's appearance (except on commissions issued since 14 May, 1729,) where the bankrupt hath before surrendered himself to be examined, in which case, the

(a) The great seal may enlarge bankrupt's time for furrendering, &c. to 50 days, so as the order be made fix days before day of surrender, &c. Stat. 5 Geo. 2. c. 30. s. 3. but it was usual, in case a memorandum was brought to the acting commissioners, fitting at Guildball, from the secretary of Bankrupt's office, that a petition was lodged for the enlargement of time to surrender, &c. to receive such notification in lieu of an order, which is now resused, because lord Appley hath been pleased to order, that no such petition shall be received, unless the same be presented so as to be answered six days before the day the bankrupt is required to sinish his examination, exclusive of the day whereon the same is answered. See Order, dated 20 April, 1773.

A commissioner of bankrupt, on his being examined before a committee of the house of commons, touching the bankrupt laws, to whom the petition of several bankrupts was referred, submitted, that if a bankrupt did not furrender till the last day, that he should furrender at ten o'clock in the morning of that day, and this for the ease of the commissioners, who are obliged to fit till twelve o'clock at night, of the last day, and perhaps all night. See the report in 28 vol. Com. Journ. but courts of justice have fince been of opinion, that it was unnecessary to have recourse to the parliament to remedy such evils for lord Mansfield, in Perror's case, declared, that the commissioners might adjourn. see 2 Bur. Rep. 1124, 1125, and lard Appley bath ordered bankrupts to furrender between the hours. of ten and one in the forenoon. See all his lordship's orders for enlarging bankrupt's time, made fince 20 April, 1773.

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commissioners shall appoint only one fitting more, for the purpose of such persons surrendering and conforming himself, unless the assignce shall think more fittings necessary, (and desire the same) and three weeks notice, at least, shall be given in the Gazette of the time and place of such meetings.

With all due deference to the legislature, we beg leave to offer an observation on the

above clause.

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It is allowed on all hands, we believe, that the bankrupt statutes are the fole guide and authority for the commissioners, and all others, who act in bankrupt matters, to determine themselves by; accuracy, perspecuity, and certainty are therefore effentially necessary in penning these acts; the clause under confideration feems, in our humble opinion, totally deficient in every one of the above requifites, for the legislature by making use of the words meetings and fittings, as above fet forth, hath rendered rather doubtful, whether the commissioners are not obliged to give three weeks notice, at least, of every meeting within the forty-two days, for all bankrupts to furrender and conform; this feems the natural construction of the express words of the act, as we apprehend that the word meetings alludes to bankrupts who have furrendered themselves since 14 May, 1729, and the word fittings to bankrupts who did furrender before faid 14 May, 1729.

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But yet, on consideration, the express words of the act, cannot convey the meaning of the legislature, because the time for the surrencter, &c. of the bankrupt is limited to forty-two days, or six weeks, whereas three weeks notice on each of the meetings would extend it to nine weeks.

Upon (a) certificate under the hands and feals of the commissioners that a commission is issued, and the party proved before them bankrupt, any justice of the superior (b) courts in Westminster-ball, or any justice of the peace shall, upon application, grant his warrant under his hand and seal for apprehending the bankrupt, and committing him to (a) goal, there to remain until he be removed by warrant under the hands and seals of the commissioners, in order for his examination and discovery.

A commission of bankruptcy being taken out, and the party declared bankrupt, after the three sittings at Guild-ball had been advertised in the Gazette for the bankrupt to surrender, and to discover his estate and effects, the commissioners in the intermediate time having met, and examined witnesses

(a) Stat. 5 Geo. 2. c. 30. f. 14.

upon

<sup>(</sup>b) Viz. King's Bench, Common Pleas, or Exchequer.
(c) The goaler or keeper to whose custody the bankrupt shall be committed is to receive him, and forthwith to give notice to the commissioners thereof. Stat.
600. 2. C. 30. s. 14.

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upon interrogatories, and finding upon fuch examination, that the bankrupt had been removing and concealing his effects, and fraudulently conveying his real effate, in order to defraud his creditors, thought proper to fummon him by their messenger to appear before them the next morning; and it appearing that he had been ferved with the fummonce, and refused to attend, the commissioners in pursuance of the above clause certified this fact to Mr. justice Chapple, who committed him to Newgate, and upon the keeper of Newgate's fending a written notice to the commissioners, that he had the bankrupt in his custody, they immediately fent their own warrant to bring him before them, and upon his refusing to take the oath in order to his being examined, they re-committed him to Newgate.

The bankrupt preferred his petition to lord chancellor Hardwicke, suggesting, that he had been illegally committed to Newgate, and prayed that he might be discharged from his

confinement.

Lord chancellor: As to the legality of the commissioners certificate to Mr. justice Chapple, and the proceedings upon it, 'tis an intire new question, and quite a new case; and therefore at the first opening of it I had great doubt, whether I could properly determine the legality of the commitment, as an habeas curpus might have been sued out, and have

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been decided by the judges of the common law, which is the ready way. But I do remember a case of John Ward before lord chancellor King, not unlike the present. where he determined a commitment by commissioners of bankrupt to be justifiable, after he had taken fome time to confider of it. I think therefore the certificate which has been made in this case is pursuant to the powers given to commissioners under the statutes of bankruptcy, for by the old acts, which consider him as a criminal and fraudulent person, commissioners " had full power and authority to take by their discretions fuch order and direction with the body and bodies of a bankrupt, wherefoever he or the may be had, either in his house, sanctuary, or elsewhere, as well by imprisonment of his or her body or bodies, as also with all his or her lands, &c. and also with his or her money, goods, chattels, wares, merchandizes, and debts whatfoever, 13 Eliz. c. 7." The rigour of the law indeed, as to his person, is taken away, and yet the power of examining still remains; but though the feverity of the old acts is mitigated, yet a greater punishment is inflicted; for a bankrupt, if he does not furrender, is now guilty of felony without benefit of clergy, but then he has to the last day to conform himfelf to this and the other acts. The 5 Geo. 2. appoints three fittings at Guildhall, in the **ipace** 

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space of forty-two days, for particular purposes; but would it not be a very great abfurdity, if the bankrupt might make use of the forty-two days to embezzle his effects, and to quit the kingdom; and that the commissioners, though apprised of his intention, should have no power to prevent it, by summoning him before them in the intermediate time, and committing him if he resuses to be examined?

It has been objected by the bankrupt's counsel, that the commissioners have made the certificate variant from the summonce, for the latter is general for the bankrupt to attend, and the certificate mentions the cause for which they fummoned him, namely, to examine him upon an embezzlement of his But there is no weight in this objection; for the commissioners were not under any necessity of mentioning the cause of fummoning the bankrupt in their certificate, because the judge, upon their barely certifying that he refused to attend, is obliged to commit him. As in this case the commisfioners had full evidence of the bankrupt's intention to fecrete his effects, and to make fraudulent affignments of them, they (a) have done rightly, wifely and discreetly in the

<sup>(</sup>a) Francis Warden, Esq. one of the present commissioners of bankrupes, was an asting one under this commission.

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method they have taken to prevent it, by fummoning the bankrupt, and committing him for disobeying their summonce. I do not fay this to encourage commissioners of bankrupt to use this power wantonly, but upon fuch circumstances as appear in the present case, I am opinion it was very properly exercised, and the proviso which immediately follows the clause that relates to the certificate of commissioners of bankrupt to the judges, &c. in the 5 Geo. 2. makes it extremely clear, that the commissioners at their discretion may examine a bankrupt in the intermediate time, between his being declared a bankrupt, and the fittings at Guildball.

For the words are, "Provided (a) always, that if any such person or persons, so apprehended and taken, shall within the time or times allowed by this act for that purpose, submit to be examined, and in all things conform as if he, she, or they had surrendered, as by this act such bankrupt or bankrupts is or are required, that then such person so submitting and conforming, shall have and receive the benefit of this act, to all intents and purposes, as if he, she, or they, had voluntarily come in and surrendered himself, herself, or themselves; any thing

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(d) Persons are confider

<sup>(</sup>a) Stat. 5 Geo. 2. c. 30, f. 15:

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(a) Aik. Rep. 240, pl. 131. 2 Eq. Caf. Abr. 99-

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The Proof of Debts.

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ORD Hardwicke (a) often said, that the aim of the legislature in all statutes concerning bankrupts was, that the creditors should have an equal proportion of the bankrupt's effects as far as possible. Lord (b) Mansfield expressed himself to the same purpose on a like occasion.

Creditors may come in within four months after issuing of the commission, and until a dividend be made (c); and shall be at liberty to prove (d) their debts under the commission, without paying any contribution

nes and pur safes, as if he, the, or the

<sup>(</sup>a) Ark. Rep. 183. 229. 233.

<sup>(</sup>b) Bur. Rep. 476, 477.

<sup>(</sup>c) Stat. 1 Jac. c. 15. 14.

(d) Persons are considered only as creditors at large of a bankrupt, till they have proved their debts under the commission. Ask. Rep. 153. pl. 92. id. 149.

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count of fuch debt (a).

The common proof before the commifsioners is the (b) oath of the creditor, which is binding, unless the bankrupt, or the other creditors object to it, and then it is (c) examined, and an appeal (d) lies from the determination of the commissioners to the great feal by petition, but if no objection is made

(a) Stat. 5 Geo. 2. c. 30. f. 25.

(b) The commissioners may examine upon oath, or otherwise, for the discovery of the truth and certainty of debts, for which the creditors feek relief by the commission, stat. 21 Jac. c. 19. s. 9. And if such creditors perjure themselves either viva voce before the commissioners, or by assidavit or assirmation exhibited unto them, they shall suffer the penalties inflicted by ftat. 5 El. c. 9. f. 3. & ftat. 2 Geo. 2. c. 25. f. 2. (perperuated by 9 Geo. 2. c. 18.) against wilful perjury; and shall be liable to pay double the sum so sworn or affirmed to be due, stat. 5 Geo. 2. c. 30. f. 29.

(c) Lord Hardwicke faid, that if there did not appear to the commissioners any reasonable objection to the fairness of the debt, the creditor ought to be admitted; but that if they (though the creditor had made a positive oath) had just grounds to doubt the fairness of the debt, they did right to admit it only as a claim. Ath. Rep. 71. Nay, that if it was not made out to their

satisfaction, it might be rejected: Atk. Rep. 222.

(d) A creditor offered proof of his debt, which the commissioners disallowed, whereupon application was made to the court, who at first declined to meddle with it, but at length consented to hear the proof. Chan. Caf. 275.

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in a reasonable time, such proof by oath is

(a) conclusive.

Creditors (b), upon what fecurity foever they be, come in equal, unless fuch as have obtained actual execution, or had taken pledges for their just debts before the bankruptcy, and the reason is, because from the act of bankruptcy, all the bankrupt's estate is vested in the commissioners, who are established as courts of justice touching the bankrupt's estate, and before whom the creditors must authenticate their debts, in order to receive their dividends; and therefore they must equally admit all persons to make proof of their debts.

A creditor, though he hath fecurity, may come in and prove his debt, because possibly his security may prove deficient (c); and every creditor is to fwear whether he has a fecurity, or not, and if he has a fecurity, and infifts upon proving his debt, he must deliver up the security for the benefit of the ereditors at (d) large, be they mortgages or (e) pledges, unless it be a joint fecurity from the bankrupt, and another

(b) Bac, Abr. 258. See Creditor by Judgment.

(1) A.k. Rep. 105.

<sup>(</sup>a) By Hardwicke Chancellor. Atk. Rep. 77.

<sup>(</sup>c) 7 Vin. Abr. 74. pl. 8.
(d) It feems that it should be creditors under thecommission, not creditors at large, because lord Hardwicks made a distinction between such creditors. See fol. 81. Note (d).

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person, for then he may come in for his whole debt under the commission, without being compelled to deliver up such joint security, as he is (a) entitled to get in what he

can from the co-fecurity.

Where a creditor proves a debt under the commission, and also proceeds at law for the recovery thereof, and detains the bankrupt in custody on the action, his only relief is to petition the great seal, that the creditor or plaintiss may make his election, either to abide by the commission, or to proceed in his action; whereupon he will be ordered to make such election within a limited time, usually about a week; and which ever remedy the creditor chuses, he will be at liberty to assent to, or dissent from, the certificate: but if the election be to proceed at law, the creditor must receive all dividends under the commission.

If a man trade with a bankrupt between the act of bankruptcy and the commission sued out, whether by delivery of goods, or payment of money, without notice of the act of bankruptcy, the bankrupt keeping open trade, such person shall come in as a creditor for such goods or money (b).

As to goods fold to a bankrupt, or money received of him between the act of bankrupt-

<sup>(</sup>a) 2 Atk. Rep. 528. (b) 7 Vin. Abr. 69. pl. 6. so determined in 1716.

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cy, and the commission fued out, without notice of the act of bankruptcy, the bankrupt keeping open trade; lord Mansfield (a) faid, that till the making of flat. 19 Geo. 2. c. 32. if the bankrupt had bona fide bought goods, or negotiated a bill of exchange, and thereupon, or otherwise in the course of trade, paid money to a fair creditor, after he himself had committed a secret act of bankruptcy, such bona fide creditor was liable to refund the money to the affignees, after a commission and assignment; and the payment though really and bona fide made to the creditor, was avoided and defeated by the fecret act of bankruptcy; but that this was remedied by the above statute, in case no notice was had by the creditor, (prior to his receiving the debt,) "That his debtor was be-" come bankrupt, or was in infolvent cir-" cumstances."

The legislature (b) has declared, that previous to the year 1746, if a bond fide creditor

(a) Bur. Rep. 32.

<sup>(</sup>b) In the preamble to flat: 19 Geo. 2. c. 32. f. 1. the parliament declared, that many persons within the description of, and liable to, the statutes concerning bankrupts; frequently committed secret acts of bankruptcy, unknown to their creditors and other persons, with whom, in the course of trade, they had dealings and transactions; and after the committing thereof, continued to appear publicly, and carried on their trade and dealings, by buying and selling of goods and merchandizes

of a bankrupt had received his debt of fuch

bankrupt, between the act of bankruptcy

and the commission, though such creditor

had no notice of the act of bankruptcy, yet

such payment was void, and the creditor was

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obliged to refund. The law as to the point of the debtor of a bankrupt's refunding feems to stand thus, according to the reporters of good authority

in Westminster-ball.

A bankrupt may receive his debts after an all of bankruptcy committed, from such of his debtors as do not know him to be bankrupt (a), and the payment will be good, and a dif-

chandizes, drawing, accepting, and negociating bills of exchange, and paying and receiving money on account thereof, in the usual way of trade, and in the fame open and public manner as if they had been folvent persons, and had not become bankrupts: and that the committing such secret acts of bankruptcy to avoid and defeat payments, really and bona fide made in the cases, and under the circumstances above mentioned, where the persons receiving the same had not notice of, or were privy to, such persons having committed any act of bankruptcy, would be a great discouragement to trade and commerce, and a prejudice to credit in general.

(a) Stat. 1 Jac. c. 15. f 14. 2 Show. Rep. 522. 7 Vin. Abr. 108. 2 Eq. Caf. Abr. 396. pl. 3. Lord Hardwicke said, that this statute did not indemnify a creditor of bankrupt, unless it appeared that he had no notice of the bankruptcy at the time of receiving his money; and that the courts of law had confidered this an hard case, and always required a strict proof of no-

tice. Atk. Rep. 157.

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rathe relati and r charge against the commissioners and the assignees (a); so, if the party was compelled to pay by fuit (b); and formerly, till the commission sued, the debtor ought not to repay, though he had notice of the bank-

ruptcy (c).

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Lord (d) Hardwicke observed, that the relation of acts of bankruptcy was as hard a case as any in the law, because this relation might go a great way back, and over-reach all transactions without regard to their being fair (e) or fraudulent; that it held in fales of goods, and payment of money, and overturned not only contracts, but acts upon record, and legal acts, as judgments, and executions executed, where (f) these acts happened after the act of bankruptcy com-

He observed further, that it was said fictions of law should not enure to the prejudice of any body, but were invented to support rights, and to be fure (he faid) that was the rule, but that this case was taken out of

(a) 3 Keb. Rep. 190. pl. 38.

(f) See Bur. Rep. 32, 33, 37.

<sup>(</sup>b) 3 Keb. Rep. 232. Vern. 94. 2 Ventr. 358. (c) 3 Keb. Rep. 232. Freem. 349. pl. 435.

<sup>(</sup>d) Atk. Rep. 127. Vef. Rep. 328, 329, S. P. (e) Doctor Blackstone's opinion on this matter feems rather injudicious; for he fays, that the intention of this relative power is only to reach fraudulent transactions, and not to diffress the fair trader. 2 Black. Com. 486.

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another general rule, which had been adhered to for the fake of public utility, viz. That it was (a) better a private mischief should ensue, than a general inconvenience; but that fince trade had increased, the mischiefs and inconveniencies had multiplied, and therefore the above stat. 19 Geo. 2. c. 32. was made, and one of the principal cases provided for by it, was the negotiation of bills of exchange, and though the party might not bring himself strictly within the act, yet if he was within the meaning of it, the court of chancery would go as far as it could in support of it.

We will now confider creditors more particularly, and for that purpole digest them in

· alphabetical order.

## A.

Lord Hardwicke referred it to the commisfigners to fettle the value of an annuitant's life, and that she be admitted a creditor for fuch valuation, and the arrears of the annuity, and not for the whole (b) purchasemoney.

(a) Lex citius vult tolerare privatum Damnum, quam publicum Malum. Co. Lit. 152. b.

Lord

<sup>(</sup>b) The creditor gave 300 l. for an annuity of 30 l. a year, for her life, payable out of the bankrupt's estate; as the annuitant had enjoyed the annuity eightteen years, his lordship thought it unreasonable that she

Lord (a) chancellor King, Talbot, and Hardwicke, ordered an apprentice, whose master became bankrupt, to be admitted as a creditor (b) under the commission on account of the apprentice fee received by the master, only for the remaining fum thereof, after deducting for the time he lived with the bankrupt.

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W. draws bills of exchange on H. who had no effects of W. in his hands, the bills are transmitted to R. and Company, and indorsed over by them to several persons. Lord (c) Hardwicke ordered the affignees of R. & Co. to be admitted as creditors under W's commission, for so much as they had paid to the indorfees of W's bills of exchange under R. and Co's commission.

should have the whole purchase money. Aik. Rep. 251. pl. 134.

(a) Aik. Rep. 149. pl. 89. See id. 261. Apprentice-fhip is not dissolved by the bankruptcy of the master. Str. 582. 8 Mod. 235. Sef. Caf. 278. pl. 218. Fortefc.

Rep. 231. 2 Ld. Raym. 1352. Foley, 229.
(b) But lord Hardwicke on another occasion held, that the most equitable method was to allow the apprentice a grofs fum out of the bankrupt's effects, and that commissioners of late years had recommended it to creditors to allow it, and in his opinion very rightly, for it would be hard to make the apprentice come in as a creditor under the commission. Att. Rep. 261.

(c) Atk. Rep. 122. pl. 67.

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The execution of the affignment by the commissioners under the commission, on behalf of which the assignee applies to be admitted a creditor, should be proved, either by affidavit before a master in Chancery, exhibited to the commissioners, or viva voce before them, but the bankrupt need not join with his affignee in the deposition, because though the bankrupt hath actually received the debt, the payment may happen to be void as to his affignee.

In (a) equity a bond is affignable for valuable (b) confideration paid, and the assignee alone becomes entitled to the money, fo that if the obligee after (c) notice of the affignment, pays the money to the obligee, he will be compelled to pay it over again; and though a bond, being a chose in action, cannot (d) be affigned over by law fo far as to enable the assignee to sue in his own (e) name,

yet

(d) Unless for a debt due by an assignor to the as-

fignee. 3 Lev. Rep. 234. Noy. Rep. 52.

(e) And by the modern practice he may sue for it in the name of the obligee, as his attorney, fo faid by Burnet.

<sup>(</sup>a) 2 Vern. 595. pl. 534. Because the affignor can furnish the offignes with all the means of reducing it into possession. By Burnet Just. Aik. Rep. 171.

<sup>(</sup>b) 3 Chanc. Rep. 53. [\*90.]
(c) 2 Vern. 540. But payment to the obligee without notice of the affignment is good. Chanc. Cal. 232.

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yet he has by the affignment such a title to the paper and wax, that he may keep or cancel it.

Bonds are assignable in Holland, and therefore an assignment of bonds there, according to their custom, are allowable here, by

lord-keeper (a) Finch.

The obligee in the original bond must join with the assignee in the deposition that he hath not received the debt, or any part thereof, or any security or satisfaction for the same, for if the obligor (the bankrupt) has discharged the debt, though he paid it to the obligee with notice of the assignment, yet the bankrupt's estate in such case is totally discharged; and the assignment must take his remedy over in chancery against the obligor.

Though (b) debts are not (c) affignable in law, yet they are on good confideration af-

Burnet. Just. Ack. Rep. 171. but Bacon doubts whether this can be done without an express authority. Bac. Abr. 157.

(a) Chan. Caf. 232.

(b) 2 Chanc. Caf. 7. 36.

(c) A chose in action may be assigned over for lawful cause, as a just debt, but not for maintenance. 15 H. 7. 2 pl. 5. Bro. Abr. 137. pl. 3. Other authorities say, that if one assigns over his debt to another, and the debtor agrees to it, yet that the offigure shall not have action, nor the debtor be discharged against the assignor. 11 H. 6. 7. pl. 12. 16. pl. 9. by the court, Bro. Abr. 225. pl. 178. which note; 3 Vin. Abr. 151.

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fignable in equity. Lord keeper (a) Bridgman iaid, that he would not protect the assignment of any chose in assign, unless it was in satisfaction of some debt due to the assignee, but not where the debt or chose in assignee owed nothing precedent, so that the assignment was voluntary, or for money then given. By the law of merchants, a merchant may (b) assign debts. The original creditor multipoin in the deposition with the assignee. (For the assignee of a ship, see Mortgagee)

An attorney had been employed by one who became bankrupt; affignees petition to have up papers, and that the attorney might come in for his demands pari passu, with other creditors.

Lord chancellor Talbet: the attorney hath a lien upon the papers, in the same manner against assignees, as against the bankrupt; and though it doth not arise by any express contract or agreement, yet it is as effectual, being an implied contract by law; but as to papers received after the bankruptcy, they cannot be retained; and therefore if the assignees desire it, let the bill be taxed, and upon payment papers delivered up (c).

<sup>(</sup>a) 2 Freem. 145. pl. 185.

<sup>(</sup>b) 2 Chan Caf. 37.

<sup>(</sup>c) 7 Vin. Abr. 74. pl. 8.

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If A. is bail for B. either to bring in his body, or to pay the condemnation money, and B. becomes a bankrupt, whereupon A. pays the money, he may come in as a cre-

ditor (a).

If the bail be liable, that is, if he has justified himself as such, before his principal becomes bankrupt; though he be not fixed till after, yet it seems he is well entitled to make his claim forthwith, and to prove, as soon as he has paid the condemnation money, otherwise there could be no reason for the distinction between "debitum in prasenti, solvendum in (b) futuro." Yet quere, for lord (c) Hardwicke declared bail were no creditors till damnified. See Sureties.

The creditor of a bankrupt had bills of exchange on merchants in Holland, who made themselves liable by accepting them, and afterwards failed and compounded with their creditors; so that this creditor had two perfons at stake for his debt, one of them bankrupt, and the other had made a composition; this creditor had received nothing under the composition, at the time he proved his debt, under the commission of bankrupt,

(a) Com. Dig. 527.

(c) Atk. Rep. 238. pl. 130.

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<sup>(</sup>b) See 2 Stra. 949. 2 Barnard. K. B. 251, 355.

Creditor by Bill of Exchange. Chap. 3. and therefore admitted a creditor for the whole before a dividend he received two shillings and fix pence in the pound. Under the composition of the acceptors of the bills; the commissioners directed that he thould be paid his dividend, after deducting what he had received on the bills of exchange; the affiguees faid, that he should be paid a dividend only on the fum left after deducting the 2 s. 6 d; but (a) this would be taking away from a man the double fecurity he had, and which he might make use of in law and equity, till he (b) was fatisfied his whole debt; as the composition was not paid till after the debt proved, the creditor should receive a dividend on his whole debt pro rata with the other creditors, and accompt thereafter for what he had received, or should receive on the bills of exchange; and that this would not be any prejudice to the estate, for

(a) So faid by lord Hardwicke. Atk. Rep. 110.

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<sup>(</sup>b) Suppose (faid lord Hardwicke) there are several obligors, the obligee may have several actions against them all, several judgments too, and several executions; but he shall not levy more than one satisfaction for his debt; if he does, courts of law will step in. [Stra. 5.15.) The same in bills of exchange, actions, &c. lie against drawer and all the indorsers, but only one satisfaction for the debt; so under commissions of bankrupt, the creditor is entitled to come under the commission against all the obligors, drawers, &c. and this is not a preference given to such creditor, but a benefit he is entitled to at law, upon all his securities, till he is completely satisfied. Alk. Rep. 110.

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if he received more from those bills of exchange than would answer 20 s. in the pound,
he should accompt to the assignees for the
surplus.

Lord Hardwicke said, that this case differed from that in (a) which the court would not admit a person who had received a divinend of 6s. against the drawer, to prove more than the remaining 14s, as a creditor under the commission against the indorsee, because the creditor there had received the benefit before he had attempted to prove his debt against the indorsee under the commission (b).

A. drew a bill, payable to B. on C. in Holland, for 100 l. C. accepts it, afterwards A. and C. became bankrupts, and B. receives 40 l. out of C's effects, after which he wanted to come in as a creditor for the whole 100 l. out of A's effects. Lord chancellor Macclesfield permitted B. to come in as a creditor for 60 l. and directed the master to see whether the other 40 l. was paid out of A's effects in C's hands, or out of C's own effects; if the latter, then C. was a creditor for this 40 l. also, but if out of A's effects, then 40 l. of the 100 l. was paid (c) off.

(1) 2 Wil. Rep. 89. pl. 21.

<sup>(</sup>a) See under " Creditor by note of hand."

<sup>(</sup>b) Aik. Rep. 111. 2 Vef. Rep. 113. pl. 46. S. C.

The costs and charges of protesting bills of exchange accrued before the commission iffued, allowed by lord Hardwicke (a); to be proved under the commission; but no part of the costs arisen afterwards. and . sanigitis

If a man draws a bill of exchange before he becomes bankrupt, though it is not pratested till after, yet it feems that the debt incurred thereby may be claimed immediately, and proved when the bill is returned protested; otherwife the distinction of " debitum in presenti, solvendum in suturo" would be groundless (b). very day's experience to admit him re-slbi bna

A. lent money to B. and C. on their bonds. B. became bankrupt, the commissioners asfigned the estate in trust for the creditors.

A Hill and

A. fued the bond against C. and got judgment, and took him in execution by a ca. fa. and thereupon C. paid A. 241. but being old and poor, A. consented to discharge him out of custody. Lord chancellor (c) Harcourt. decreed A. to come in as a creditor for a moiety of what remained due on the bond, for the execution being subsequent to the assignment of the bankrupt's estate, should not (at least in equity) discharge As demand out of the bankrupt's estate; but because

(a) Ack. Rep. 140. pl. 81.

(c) Wil. Rep. 237. pl.

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<sup>(</sup>b) See 2 Stra. 949. 2 Barnard. K. B. 251. 2. Kel. 239. pl. 191. " Contingent creditors," fol. 99.

Chap. 3. Creditor by Bond. Book-keeeper. 105

each in equity was liable but to half the debt, and C. was not the original debtor for the whole, A should have relief only for a moiety of his remaining debt against the assignees; but had the bankrupt been the original debtor, and had borrowed all the money, then A. should come in before the

affignees as a creditor for all his debt.

Lord chancellor Hardwicke said, that though a creditor on bond and an open accompt besides, was finally to be admitted a creditor only for the balance, yet it was every day's experience to admit him to prove the bond debt, but still the commissioners might take the accompt afterwards, and the creditor should be entitled, on a dividend, to no more than what appeared to be really due to him on the balance (a). See "Inte"rest."

Though the book-keeper of a merchant or tradefman, is (b) allowed to make an affidavit, in order to hold a defendant to bail at law, who stands indebted to his master, if he will swear (c) positively to the debt, such

(a) Atk. Rep. 70.

(b) 2 Stra. 1226. 2 Barnard. K. B. 256. 2 Kel.

114. pl. 65.

<sup>(</sup>c) A positive oath of the debt is required, both by the act of parliament (12 Geo. c. 29. s. 2. perpetuated by 21 Geo. 2. c. 3) and by the established rule of the court. 2 Bur. Rep. 655,

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book keeper ought certainly not to be admitted to prove a debt for his master under a commission of bankrupt; because under commismissions of bankrupt the creditor's (a) own positive oath is required, but the act of parhament (b) for holding to bail or arresting defendants, difpenfes with the oath being taken by the creditor himself, provided the oath be positive, for then it may be taken by any person; and upon consideration the distinction seems reasonable, for the oath required at law it only to oblige the debtor to give his creditor good fecurity, that the debt when legally recovered shall be satisfied; whereas the oath taken under commissions of bankrupt, gives the proof of the debt, the effect of a verdist or judgment at law, and as to the objection, that the creditor's oath. for substantiating his own demand ought to be rejected, as being the evidence of a party interested, which in general is not admissable at law; it may be answered, by observing that the jurisdiction under commissions of bankrupt is equitable, as well as legal.

A. by articles was to build certain houses, B. furnished him with materials, and took an affignment of the articles for his secu-

<sup>(</sup>a) Tr. Atk. Rep. 77.

Chap. 3. Collector of Taxes. Companies. 107
rity, but before the assignment A. was bankrupt. a repair reflect sid 102

Lord chancellor Cowper: B. has a special equity, in as much as by what he advanced, A. was enabled to perform his agreement to the common benefit of the creditors, and therefore B. shall have all his money he advanced after he had a specific interest in the articles; but as to what he gave credit for before, he trusted as another creditor.

And lord chancellor put the case of A. in building a ship, he becomes bankrupt, and after B. furnishes materials to finish it; B. shall have all his money, and not come in average with the other creditors (a).

## C.

The collector or gatherer of taxes must produce his authority, viz. his appointment or deputation, that the commissioners may judge of the legality of it, otherwise the bankrupt's estate may be doubly charged for one and the same debt. See " Pa-" rishioner."

The clerk is usually appointed receiver of his company, and is therefore the proper perfon to prove a debt due from a bankrupt to his company, his appointment under the com-

<sup>(</sup>a) 7 Vin. Abr. 73. pl. 4.

mon feal of the company, must be exhibited to the commissioners.

Every person who shall give credit on securities, payable at a future day to persons. who are or shall become bankrupts, upon good confideration, bond fide, for money or other thing, not due before the time of fuch persons becoming bankrupts, shall be admitted to prove their securities (a) or agreements, as if they were payable prefently, and shall have a dividend in proportion to the other creditors, discounting 51. per cent. per ann. from the actual payment, to the time fuch money would have been become due (b),

A tra-

(a) From which the bankrupt shall be discharged, as if fuch money had been due before the time of his be-

coming bankrupt. ftat. 7 Geo. c. 31. f. 1. (b) Stat. 7 Geo. c. 31. f. 1. The occasion of making this law was, that merchants and other traders in. goods had been very often obliged, and more especially of late years, to fell and dispose of their goods and merchandizes to such persons as had occasion for the same, upon trust or credit, and to take pills, bonds, promifory notes, or other persons securities for their monies, payable at the end of three, four, or fix months, or other future days of payment, and the buyers of such goods becoming bankrupts, and commisfions of bankruptcy being taken out against them, before the money upon such bills, bonds, &c. became payable, it had been a question whether such persons giving fuch credit on such securities, should be let in to prove their debts, or be admitted to have any dividend, or other benefit by the commission, before such time

Chap.

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as fuch great di credic w rupt, C to this 1 trade, I words e. of mone mean se bonds, K. B. 2 in cafe day, an became bankru any act his cred ditor no the con that if luable ( payable livered day of that in the con fore for

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A trader contracted with the East India company at one of their sales for the purchase of a parcel of East India goods, to be paid for at a future day, and before the day of payment he became bankrupt. Lord chancellor King held this case not within

as such securities became payable, which had been a great discouragement to trade, and a great prejudice to tredit within this realm. In a queftion about a banknot, chief justice Lee held, that though the preamble to this flatute spoke only of bonds given for goods in trade, payable at a future day, yet that the enacting words extended to all forts of bonds for the payment of money; and that the words fuch fecurity did not mean fecurity for such a fort of debt, but security by bonds, bills, notes, &c. 2 Stra. 1711. 2 Barnard. K. B. 255. Lord chancellor King faid, that formerly in case a trader contracted a debt payable at a future day, and afterwards (but before the day of payment) became bankrupt, this not being a debt until after the bankruptcy, at which time the bankrupt could not do any act to alien or leffen his estate to the prejudice of his creditors, fuch contract was held void, and the creditor not allowed to come in for a fatisfaction under the commission; and in some cases it was thought hard, that if one, on the buying of goods, or for other valuable confideration, should give a note under his hand payable at a future day, and actually had the goods delivered to him, or the money lent him, and before the day of payment the debtor should become bankrupt, that in this cafe the creditor should not come in under the commission with the rest of the creditors; wherefore for the remedying of this, the flatute was made, 2 Wil. Rep. 396. pl. 124. 2 Lord Raym. 1549. 7 Vin. Abr. 72. pl. 7. Ark. Rep. 116.

the statute, because (a) the goods were not delivered, nor the contract signed by the

party (b).

And at this day, if a bond or note be given by a trader upon a contingency, and before it happens the trader becomes bankrupt, and then the contingency happens, this is not within the act, neither shall the debt arising (c) after the bankruptcy be satisfied under the commission (d); for it was uncertain whether such bond or note would ever become payable or not, by reason of it's depending on a contingency which had not happened at the time of the act of bankruptcy

(a) There being no express words in stat. 7 Geo. c. 31. as to either the delivery of the goods, or as to the contract's being to be signed by the party; quers the authority of this opinion of lord King.

(b) 2 Wil. Rep. 396. pl. 124.

(c) But if the contingency happens before the bankrupt's estate be fully distributed, such creditor shall come in pro rata. 2 Wil. Rep. 499. Meseley 79. pl. 51.

(d) By lord chancellor King. 2 Wil. Rep. 397, 497. pl. 159. Eq. Caf. Abr. 54. pl. 3. S. P. by L. C. J. Raymond. 2 Stra. 869. 2 Lord Raym. 1549. Barnard. K. B. 59. S. P. by lord chancellor Macclesfield; 7 Vin. Abr. 71. pl. 4. S. P. By lord chancellor Talbot. 7 Vin. Abr. 72. pl. 7. Atk. Rep. 114. Lord Hardwicke said, as to the case that had been mentioned, in 2 Wil. Rep. 497. it was barely an opinion of lord King, and not the case in judgment; but he did obiter declare his opinion only; that lord Talbot afterwards doubted of lord King's opinion, and in a case fince, lord Hardwicke had differed from him entirely, and had no occasion to alter his opinion. Atk. Rep. 118.

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committed, and so it was impossible to make an abatement of 51. per cent. as the act directed (a), which extended only to creditors at a future day certain. (b). And lord chancellor King was of opinion, that no part of the bankrupt's estate should wait or be deferred from being distributed, the act ordering that the bankrupt's estate should be distributed within four months; especially that the distribution should not wait, as in the present case, for a debt which was neither debitum in præsenti and never might be debitum in futuro, in regard the obligor or drawer of the note, after his certificate allowed, might go to his trade again, and become a folvent person, able to pay off the bond or note, and therefore the court refolved, that the contingent creditor should not come in for a distribution, neither should the money be referved in favour of fuch contingency (c).

Lord (d) Hardwicke said, that there was no such thing as drawing a line between the contingency not happening before the bank-

<sup>(</sup>a) 2 Lord Raym. 1549. Moseley 79 pl. 51. 2 Stra. 868. admitted in K. B. and afterwards affirmed in ersor. Com. Dig. 527. Lord Hardwicke said, there had not been one case since 2 lord Raym. 1546. in the court of king's bench, but what had been determined expressly against a contingent interest. Ask. Rep. 114.

<sup>(</sup>b) Barnard. K. B. 95. Aik. Rep. 130. (c) 2 Wil. Rep. 498. Moseley 79. pl. 51.

<sup>(</sup>d) Atk. Rep. 119.

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ruptcy, and yet happening before the time of distribution; that this would not only be an hardship on the bankrupt, but on the rest of the creditors, whose debts were actually due, but would have given the contingent creditor a superior privilege, by leaving it open to him to recover the remainder of the debt against the bankrupt; and he (a) observed that contingent debts were sometimes cases of value, more often cases of hardship and compassion, and that it were to be wished they were remedied and settled for the suture by (b) act of parliament.

E.W. previous to his marriage with C. gave his bond to her father in the penalty of 600 l. in (c) trust that if the marriage should take effect, and C. should survive E. W. and if he should before his death by will or otherwise give or leave C. 300 l. in goods or other personal or real estate, so as the same should be paid by his executors or assigns, immediately after his death to C. without any claim by any person or persons whatsoever, then the

bond was to be void.

(a) Atk. Rep. 117.

(b) Aik. Rep, 117, 120.

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<sup>(</sup>c) Lord Hardwicke said, that the distinction taken in the court of chancery had been between a trust for the wise, and a bond absolutely given to the wise herself before marriage upon a contingency of her surviving the husband; that this was materially different from a trust, because there a person who came for equity must do equity. Atk. Rep. 114, 2 Vern. 662.

Chap. 34

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The marriage was had, and about nine years afterwards a commission of bankrupt issued against E. W. whereupon he was declared bankrupt, and a few days after that he died insolvent, before any distribution of his estate, and C. duly proved the bond before the commissioners, but the assignces refused to make any dividend to the wise; she therefore petitioned load Hardwicke, as her husband made no other provision for her in his life-time, that she might be let in to receive her dividend out of the bankrupt's estate and essects in equal degree with the other creditors.

Lord (a) Hardwicke said, that it would be the hardest case in the world, if C. should not be admitted a creditor before the estate was divided away, that there were great variety of determinations in the books, and therefore adjourned it; but the rest of the creditors coming to an agreement, to let in the wife of the bankrupt as a creditor for 150l. half of the bond debt only, she acquiesced under it, and therefore lord Hardwicke gave no absolute opinion, one way or the other, but ordered it accordingly, with the consent of the assignees.

Lord (b) Hardwicke faid, that there had been a great many cases in the court of Chan-

(b) Atk. Rep. 117.

<sup>(</sup>a) Ak. Rep. 113, 114.

ruptcy, and yet happening before the time of distribution; that this would not only be an hardship on the bankrupt, but on the rest of the creditors, whose debts were actually due, but would have given the contingent creditor a superior privilege, by leaving it open to him to recover the remainder of the debt against the bankrupt; and he (a) observed that contingent debts were sometimes cases of value, more often cases of hardship and compassion, and that it were to be wished they were remedied and settled for the future by (b) act of parliament.

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(b) Atk. Rep, 117, 120.

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Lord (b) Hardwicke said, that there had been a great many cases in the court of Chan-

<sup>(</sup>a) Aik. Rep. 113, 114.

where an husband before marriage had contracted with (a) trustees for the wife, to pay a sum of money in his life-time, for her benefit, if she survived, and if she died, for her children, and if no children, for the benefit of the husband. That there had been other cases where the time of payment did not arise, till the contingency had taken effect, after the death of the husband; and that there had been other cases, where (b) the father of the

(a) If husband becomes bankrupt after breach of payment to trustees, they have always been admitted creditors upon equitable terms, and the court of Chancery had taken care, that the interest of the money should be paid to the creditors, under the commission, during the life of the husband, and the principal secured to the wife, in case she survived her husband. If judgment had been given at law by the husband for this sum, it was a debt notwithstanding the deseazance, and the trustees would have been admitted as creditors, though the terms of the bond itself were otherwise. By lord Hardwicke. Ask. Rep. 117.

(b) Upon what terms (faid lord Hardwicke) should the party be relieved against the penalty? Why, upon paying what was in conscience due out of the estate. Here was clearly a breach of the condition of this bond before the bankruptcy, for the half-year's interest was become due at Christmas, but not paid till the 10th of January, and therefore not being paid at the day, the penalty was forseited at law. It has been said, that it turns upon the act for the amendment of the law, stat. 4 An. c. 16. s. 12. "That when an action of debt is brought upon any bond, which hath a condition or deseazance to make void the same upon payment of a

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the wife had entered into a covenant to pay a fum of money after the death of bimfelf and wife, and interest in the mean time; and other cases, where an (a) husband by

less sum, at a day or place certain, if the obligor, his heirs, executors, or administrators, have, before the action brought, paid the principal and interest due, though such payment was not made strictly according to the condition or defeazance, yet it may be pleaded in bar, and shall be as effectual as if the money had been paid at the day and place according to the condition, and had been fo pleaded." Before this act of parliament, the bond was forfeited if not paid at the day. At a day or place certain, are material words: that this was a new defence, and a new plea given by the act of parliament; and therefore the common way of pleading was, that all interest was paid before action brought. But that this was not a bond with a defeazance for the payment of a less sum at a day certain, for that here the principal was to be paid at an uncertain time; for it was to be paid within a twelvemonth after the death of the survivor of father and mother. That it was not therefore a bond within the description of the statute, nor did the act of parliament intend to comprehend bonds of this nature. For suppose a bond payable at inflalments, the obligee gets judgment on the whole penalty, upon a breach of payment at the first inflalment; why, even a court of law would in fuch case act equitably, for upon the obligor's applying to the court there, and offering to pay the money due at the instalment, and agreeing to let the judgment stand as a fecurity for the rest, they would relieve the party, on payment of the money then due and costs. if this case was not within the act of parliament, then it came within the construction of the first two cases. Atk. Rep. 117, 118.

(a) Lord Hardwicke was of opinion (though he was forry he must go on niceties) that the wife, as the

articles

articles previous to marriage covenanted to leave his wife 600% in case she survived him. and afterwards became bankrupt, and died before any dividend made.

The (a) obligee in any bottomree or respondentia bond, and the affored in any policy of infurance, made and entered into upon a valuable consideration, bona fide, shall be admitted to claim, and after the loss or contingency happened, to prove his debt and demand, in respect of such bonds or policy of infurance, in like manner as if the lofs or contingency had happened before the time of issuing the commission against the obligor or infurer; and shall be entitled, and shall have and receive a proportionable part, share, and dividend of fuch bankrupt's estate, in proportion to the other creditors of such bankrupt, in like manner as if fuch loss or

law now stood, could not be admitted a creditor under a commission of bankrupt against the husband. Atk. Rep. 115. Because in this case there was not a remedy at law before such time as the act of bankruptcy was committed; or commission taken out. Ask. Rep. 118. And he further observed, that unless the debt was debitum in prasenti solvendum in suturo, it could not be proved, that in those cases where he had let in such ' creditors, a judgment was given at the time, which was an immediate debt at law, and suspended only in equity upon the defeazance. Aik. Rep. 121.

(a) And the bankrupt shall be discharged from the debt on such bond and policy of insurance. Stat. 19

Geo. 2. c. 32. f. 2. Atk. Rep. 121.

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Chap. 3.

contingency had happened before such commission issued.

The occasion of making this clause of the flatute was that (a) merchants and other traders frequently lent money on bottomree or at respondentia, and in the course of their trade frequently caused their ships or vessels, and the goods and merchandizes loaded thereon, to be infured; and that where commissions of bankruptcy had issued against the obligor in fuch bottomree or respondentia bond, or the underwriter or affurer in fuch affurance, before the lofs of the ship or goods, in fuch bond or policy of infurance mentioned, had happened, it had been made a question, whether the obligee or obligees in fuch bond, or the affured in fuch policy of infurance, should be let in to prove their debts, or be admitted to have any dividend under fuch commission, which was a disparagement to trade, therefore the above act was made.

Previous to stat. 19 Geo. 2. the obligor of a bottomree bond, becoming bankrupt before the return of the ship, and the ship not returning before the distribution made, the obligee could have no benefit of the distribution under the commission (b).

<sup>(</sup>a) Preamble to flat. 19 Geo. 2. c. 32. f. 2.

<sup>(</sup>b) 2 Wil. Rep. 499. Mofeley. 79. pl. 51.

118 Corporations, Country Creditor. Chap. 3.

The treasurer is the proper person to demand a debt due to a corporation from a bankrupt, and such treasurer must shew the commissioners his deputation or appointment under the corporation seal.

The commissioners, shall admit the proof of any creditor's debt, who shall live remote from the place of their meeting, by (a) affidavit, or being of the people called Quakers, by solemn affirmation, and also permit any person duly authorised by letter of attorney from such creditor (oath or affirmation being made of the due execution thereot) either by an affidavit sworn, or affirmation made before a master in chancery, ordinary, or extraordinary, or before the commissioners viva vace, to vote (b) in the choice of

(a) But before whom this affidavit may be sworn, the

(b) Though the act mentions the voting in the choice of assignees only, yet it seems that the letter of attorney may be for several other purposas; as for instance, to accept the trust of the assigneeship; to sign a bankrupt's certificate; to receive dividends; to consent to composition, arbitration, instituting suits in equity (for the assignees may pursue any legal method of recovering the bankrupt's estate or effects, by their own authority, 2 Black. Com. 486.) at a meeting of the creditors, to be held in pursuance of notice in the Gazette for that purpose; and it may authorize the attorney to do any other necessary and legal act, but they must be all expressly mentioned in the instrument. As

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communication or appointment under the corporation leal.

A Man who has an execution, or an (b) extent (c) ferved or executed upon the lands or

the letter of attorney to fign the bankrupt's certificate must be filed in the secretary of bankrupt's office, before the certificate can be allowed by the great seal, it seems adviseable to have one letter of attorney for that purpose only, and another for the other purposes mentioned above; because otherwise whenever it is necessary to produce it on any other occasion, as to receive a dividend, &c. the party must be at the trouble and expence of getting the secretary of bankrupt's clerk to attend with it; or of an office copy at least.

(a) Stat. 5 Geo. 2 c. 30. f. 26.

(b) An extent may be tested in the vacation, because it issues from the equity side of the court, which is always open; the teste of the writ must be the date of the stat. 2 Stra. 759. the extent will be irregular if tested previous to the stat of the baron. 2 Stra. 760. Bunt.

Rep. 165. Gilb. Eq. Rep. 223, 224.

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(c) The king is not within the statutes of bankrupt. 2 Show. Rep. 480. pl. 443. not being named. 2 Jo. 203. 2 Stra. 982. Atk. Rep. 262. pl. 142. Bunb. Rep. 202. pl. 279. 2 Ves. Rep. 456. pl. 190. So that if after the act of bankruptcy committed, and before assignment of the bankrupt's effects, an extent issues for the debt of the crown, the goods are bound thereby. 7 Vin. Abr. 74. pl. 9. 104. pl. 1. the king is bound by an actual assignment, because the property is then absolutely transferred to a third person. Show. Rep. 480, 481. 2 Stra. 982. Tri. at Ni. Pri. 39. And therefore where an extent is expected, it is usual for the commissioners

or goods of a bankrupt, before he becomes bankrupt, needs no relief under the commission (a).

A creditor by (b) flatute not fued and executed before the bankruptcy, shall come in only pro rata, though lands in fee were bound by the flatute: "quinked a sind at senior routers and has nothimmed

figures to execute a provisional, temporary, or immediate assignment, as soon as ever the party is declared bank-rupt, for if the extent bears even date with the commission of bankrupt and assignment, the extent will have

the precedence. Bunb. Rep. 33. pl. 50.

But by flat. art Car. 2. C. 11. 16 12 all brewing veffels, and utenfils for brewing, into whose bands foever the fame shall come, and by what conveyance or title foever the same be claimed, are charged with all debts and duties of excise in arrear and owing by any perfon for beer or ale made within the faid brewhouse, and fubjected to all penalties incurred by persons so using the faid brewhouse for any offence against the laws of excise; and all debts and penalties may be levied, and fuch proceedings used against the utenfils therein, as might have been, had the debtor or offender ofing the faid utenfils been truly and really owner and proprietor. thereof; fo that as far as this statute is incorporated in the subsequent excise laws, the provisions thereof exempting the particular brewing utenfils therein mentioned from being affected by the bankruptcy of the owner, extend in lavour of the crownolles and brod (

plaintiff who hath defendant's body in more than the bankrupt's body upon a statute merchant may.

Stone, 131. plagord now a vocation of a statute merchant may.

(6) Wil. Rep. 92. pl 18. id. 7381 ezie 17 Das alde

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Trever ch. just. C. B. (a) said it was plain, that a creditor by fieri facias, not served and executed, should come in only in proportion with the creditors even by simple contract, at about days of the contract, at a contract, and a contract of the 
Where a bankrupt is in execution before the commission, and the creditor comes in and receives a dividend out of the efface, the court will put him to his election either to discharge the bankrupt, or renounce the dividend, and this in conformity to the law, where if the creditor will take the debtor in execution, he cannot afterwards take execution by fi. fa. because (b) the body is deemed a fatisfaction; but otherwise, if a creditor takes f. fa. first and levies short, &c. there he may take out a ca. fa. afterwards, and fue both. Aud here A. fued out a commission of bankrupt against B. in 1726, and after in 1727, received a dividend of 2s. 6d. in the pound, and now lately took B. in execution for the rest of his debt, and B. peti-

<sup>(</sup>a) Wil. Rep. 93.

(b) Lord chancellor Parker said, that the reason of its having been frequently ruled that a creditor could not come in before commissioners, and then detain the body of the bankrupt in prison, was, because it would be unconscionable, that the creditor should detain the bankrupt's bedy in custody for non-payment of his debts, and yet seize all his estate wherewith he was to pay them. Wil. Rep. 562. Lord Hardwicks delivered himself to the same esset, on a similar occasion. Ask. Rep. 152. pl. 91.

Chap. 3.

tioned to be discharged, but was denied by lord chancellor (a) Talbot. See & Greditor by he principal breaks, against whorst inemphis mon of bankruptcy is awarded, and the

An executor shall be a creditor, though he has not a probate of the teltament before the bankruptcy (b); but he must produce it before the commissioners will admit him to prove the debt, and it ought to be (c) exhibited to them. "Creditor by extent." See " Creditor by execution." o mor bengeone reso even contrary to the express words of it, for

me take of trade and commerce. See

A Clothier became bankrupt, the queftion was, whether his (d) fallor, having cloths in his hands of the bankrupt's, might thereout retain his debt, or must come in as a creditor under the statute, and accept of a fatisfaction in proportion with other creditors, and accompt for the cloths he had in his hands, evolet ton autout allos out Aol Me

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(a) 7 Vin. Abr. 134. pl. 17. (b) Refolved in Show. Rep. 253. T. Raym. 479.

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<sup>(</sup>c) We remember an instance of the commissioners dispensing with the probate's being exhibited, on the executor's proving the debt, but there being a memorandum taken thereof, the affignees refused to pay the dividend without feeing it, by which, when produced is appeared, that the creditor was not the executor named therein.

<sup>(</sup>d) 2 Vern. 354. pl. 241. See 2 Bur. Rep. 936. 942.

A merchant remits goods to his (a) faller, and about a month after draws a bill, then the principal breaks, against whom a commission of bankruptcy is awarded, and the goods in the faller's hands are seized; it has been conceived the faller must answer the bill notwithstanding, and come in as a creditor for so much as he was forced by reason of his acceptance to pay.

Lord (b) Hardwicke said, that factors had been excepted out of statute 21 Jac. c. 19. even contrary to the express words of it, for the sake of trade and commerce. See "Principal."

The commissioners shall admit the proof of any creditor's debt, who shall reside in foreign (c) parts by (d) affidavit, or being of the people called quakers, by solemn affirma-

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<sup>(</sup>a) Mol. de Jure Marit. 496. b. 3. ch. 8. f. 8. but he doubts whether equity would not relieve in such case.

<sup>(</sup>c) We apprehend that this does not extend either to Scotland or Ireland; not to the former, by reason of the Union, for by the first article in the act (viz. 5 Ann. c. 8. 1. 1.) for that purpose, the two kingdoms of England and Scotland shall for ever after the first day of May 1707, be united into one kingdom, by the name of Great Britain; and as to the latter, lord chancellor King allowed an afficient swarm before a master extraordinary in Cork, to be read here. See Molely, 78. pl. 50.

<sup>(</sup>d) See ante, fol. 118. Note (a).

tion; and also permit any person duly authorized by letter of attorney of such creditor, (oath or affirmation being made of the due execution thereof before a magistrate, where the party shall be residing, and shall, together with such creditor's letter of attorney, be attested by a notary public) to vote (a) in the choice of assignees, in the stead of such creditor (b). For creditors at a future day, see "Contingent creditors," fol. 108.

Vere schankropinsing in the second and the second a

A Bankrupt was committed by commiffioners, because he would not answer interrogatories; the goaler gave him credit for victuals, he was not relieved, although he came in before distribution, nor will any man who trusts him (c) after (d) his bankruptcy.

(a) See fol. 318. Note (b). Again angus and benefit (b) Stat. 5 Geo. c. 30. f. 26.

(c) A. lent money to a bankrupt after a commission of bankrupt sued out against him; Trewer and Hutchins, lords commissioners, held, that he could not come in as a creditor, but was excluded; but lord Rawlinson doubted, and took it to be a new point not yet settled, and that there were no words in the act to exclude him, but lord Trewer and Hutchins held, that when the commission was sued out he was bound to take notice. 2 Vern 158, 161. it being of record. 2 Rep. 26. b. see Bur. Rep. 33.

(d) Stone, 131.

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## Chap. 3. Guardian. Creditor by Judgment. 125

The Guardian of an infant who had maintained him, was by lord Hardwicke admitted a creditor for the value of (a) an annuity, and ordered to prove the same as a debt under the commission.

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If (b) the plaintiff recover damages against the defendant, and hath (c) judgment, and then the defendant becomes bankrupt, the

plaintiff is a (d) creditor.

Where a bankrupt is in execution, and the judgment creditor has also a demand against him for rent, lord Hardwicke (e) allowed him to prove his debt for the rent under the commission, notwithstanding he refused to wave his execution.

(a) The bankrupt before the time of his bankruptcy, entered into an agreement to pay an annuity of 201. a year for the maintenance of the infant till his age of 14; with a penalty for non-payment: by his failing in one of the payments, the penalty became forfeited, whereupon the guardian of the infant applying to the court by petition, it was ordered as above. Att. Rep. 251. pl. 135.

(b) Cro. Car. 166. pl. 22. Stone, 130.

(c) If the defendant becomes bankrupt before judgment, or after, unless it be final, the plaintiff shall not add his costs at law to his debt. See " Creditor by Verdia."

(d) For it is a debt due to him, and an action of debt lies on the judgment. Cro. Car. 166. pl. 22.

(') Aik. Rep. 109. pl. 160.

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Creditors by judgment, specialty with penalty, or other security, shall not be relieved upon such judgment, &c. but for a rateable part of their just debt, without respect to the penalty (a) contained in such judgment, specialty (b), &c.

Trever, ch. just. C. B. said (c), that a judgment, or recognizance, did no more bind the lands, than the tesse of a fi. sa. bound the goods at the time of making, stat. 21 Jac.

c. 19. f. 9.

If there be an act of bankruptcy committed, and a creditor obtains judgment subsequent to it, then a commission is taken out,

the judgment is thereby (d) avoided.

A. seized in see, borrowed money of J. S. on a judgment, and then articled for sale of the lands to B. and afterwards became bankrupt. The question (e) was upon statute 21 Jac. c. 19. s. o. the judgment not being executed before the bankruptcy; 650 l. part of the purchase money remained unpaid. It was decreed at the Rolls, that the assignees should convey the premises to B. as A. had

articled

<sup>(</sup>a) This act only meant to exclude creditors from the benefit of the penalty, as against creditors (said lord Hardwicke) and not as against the bankrupt himself. Atk. Rep. 78.

<sup>(</sup>b) Stat. 21 Jac. c. 19.f. 9.

<sup>(</sup>c) Wil. Rep. 93.

<sup>(</sup>d) By Holt at Nifi Prius ; 12 Mod. 446.

<sup>(</sup>e) Wil. Rep. 737. pl. 212.

articled to do, and thereupon B. to pay the affiguees the 650 l. for the benefit of the creditors, and J. S. to come in for a propor-

tion only with the rest of them.

But though J. S. could not come in upon the bankrupt's estate for more than his proportion with the other creditors, yet it was infifted, that he should be at liberty to extend his judgment against the purchaser who bought the land prior to the bankruptcy, which feemed to be admitted, but that B. could not be deemed a purchaser until he had paid the remainder of the money, which, when paid, must go to the creditors, and that he was not compellable to pay it, unless upon his having a good title made him by the affignees, who had the legal estate of the premiles affigned to them by the commisfioners, and fo (a) decreed as above.

A creditor by judgment, cannot be admitted to prove his debt, in case a writ of error should be brought, for that preventing the plaintiff at law from either bringing an action on his judgment, or taking out execution, holds the debt in abeyance till the writ of error be nonproffed, spent, or judgment affirmed, but this creditor may claim under-fuch circumstances.

(a) Wil. Rep. 739.

ear, be the quantum what it may, even after figurent or fale by the lignees under the

rends are not in Upon the equity (a) of the statute & Ann, c. 14. (which directs, that, upon all executions of goods being upon any premises demised to a tenant, one year's rent and no more shall, if due, be paid to the landlord) it hath been held, that under a commission of (b) bankrupt, which is in the nature of a statute execution, the landlord (c) shall be allowed his arrears of rent to the fame amount, in preference to other creditors, even though he hath neglected to distrain, while the goods remained on the (d) premifes.

A landlord is intitled to diffrain the goods of the bankrupt, while they remain on the premises, for his entire (e) rent in the ar-

(a) Atk. Rep. 1047

(b) Which is not fuch a cuftodia legis, as an execution.

Att. Rep. 104. pl. 55.

(c) Who is confidered in a higher degree than a common creditor. Atk. Rep. 105.

(d) 2 Blatk. Com. 487.

(e) But if the landlord of a bankrupt fuffers the affignees to fell off the goods, he is not entitled to his whole rent, but must come in pro rata with the other creditors under the commission. Aik. Rep. 102. pl. 52. 103. pl. 53. nor shall a mortgagee who has paid the arrears of rent on a bankrupt's effate, unless he has an order to stand in the landlord's place, be preferred

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rent o but if the co waive remed (b) rear, be the quantum what it may, even after affignment or sale by the affignees under the commission, (a) if the goods are not re-

moved (b).

If there are not sufficient goods upon the premises to pay the landlard's rent, he can then only take what goods there are upon the premises, and after they are appraised and sold, as the law in cases of diffress for rent directs; then the landlard may come in as a creditor for the rent remaining due to him, with the rest of the creditors under the commission.

On a diffress for rent, goods were fold, and 77 l. 3 s. remained in the constable's hands, who became a bankrupt. The tenant dies, and his executors pray to be paid this money by the assignees, in preference to

other creditors,

Objection: This comes to the hands of the constable by due course of law, and a case was cited before lord Macclessield, and

ferred to the creditors under the commission. Aik.

Rep. 103.

(a) Because no provision is made in case of bank-ruptcy in the statute, which gives the landlord a year's rent on executions. Ask. Rep. 103. pt. 54. 104. pl. 55. but if he proves his demand for rent as a debt under the commission, and swears he has no security, it is a waiver of the distress, and he will be confined to his remedy under the commission. Ask. Rep. 105.

(b) Atk. Rep. 103. pl. 54. 104. pl. 55.

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another in the Common Pleas, where goods were taken in execution by the bailiff of Westminster, and he died, judgment and execution fet aside, and ruled that the widow and executrix of W. should refund the mo-

to pay specialties.

But per lord chancellor (a) Talbot, both the cafes cited are against executors, and though the law makes a difference between one creditor and another, yet in case of bankruptcy all creditors are upon an equal foot; if any thing remained in specie, it might be otherwise; but here the money is embezzled by the constable; so ordered the petitioner to come in as a creditor with the reft.

The bankrupt statutes do not make (b). void an agreement between landlord and te-

nant.

If an executor becomes bankrupt, the legatee (r) shall be a creditor (d).

a mortgage of land may chople

late (d), for he has (e) a property in the land. (a) 7 Vin. Abr. 74. pl. 7.

(d) Com. Dig. 527.

At

<sup>(</sup>b) 7 Vin. Abr. 129. pl. 2. (c) But as an executor cannot be bankrupt, in respect of his testator's estate, Atk. Rep. 102. pl. 51. it feems that a legatee never can have occasion to come in under the commission; unless in case of a devastawit.

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At the time a commission of bankrupt issued against M. a stour-factor, he was indebted to his miller in a large sum of money for grinding corn, and he had in his custody a considerable quantity of wheat belonging to the bankrupt, part ground and part grinding, besides a great number of sacks; money was due to the miller for grinding the corn, he therefore applied to lord (a) Hard-wicke to be paid his whole debt out of the money arising by the sale of the corn and sacks; but he was of opinion the miller had specific (b) lien on them, and therefore ought to be admitted a creditor only protanto as was due for grinding of corn in his hands.

A mortgagee of land may choose whether he will come in as a creditor under the commission or not (c), for such creditor having a real security in his own hands is entirely safe (d), for he has (e) a property in the land

(a) Aik. Rep. 235. pl. 129.

<sup>(</sup>b) A person who repairs a ship has no specific lien on it, if delivered to the bankrupt, otherwise if repaired in a foreign port, while out upon a voyage.

Aik. Rep. 234 pl. 128.

<sup>(</sup>c) Read. Stat. Law, 189. (d) 2 Black. Com. 487.

<sup>(</sup>e) Bac. Abr. 258.

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mortgaged, precedent to the translation of the property to the commissioners, who, in fuch case, have only an equity (a) of redemption; and are in no better condition than the bankrupt himself. It has been (b) held, that he is not entitled to relief (4) within the flatutes of bankrupt, for he may help himfelf by his mortgage, on the delimited with the himfelf

A. made a mortgage, and afterwards a commission of bankruptcy was taken out against him, and the commissioners made an affignment of his estate, and then B. lent 2000 In to the bankrupt on a focond mortgage, having no notice of the bankruptcy, and afterwards he got in the first mortgage; the lords (d) commissioners held that the prior moregage should not protect the mortgage fublequent to the (r) bankruptcy. In the

A mortgagee shall have his incerest run onlapon a bankrupt's estate, because he hath a right in rem, but as to the other interest, it ceaseth on the (f) bankruptcy; unless there happen to be a furplus left after pay-

<sup>(</sup>a) Rep. Temp. Finch. 466.

<sup>(</sup>b) Com. Dig. 527!00 allal 29?0 . . . . . . . . .

<sup>(</sup>F) But it now feems fettled that a mortgagee may prove his debt under the commission, but then he must deliver up his fecurity for the benefit of the creditors at large. Aik. Rep. 105 state awa risht as and she

<sup>(</sup>d) Viz. Trevor, Rawlinfon, Huschins. 15 910 915

<sup>(</sup>e) 2 Vern. 157. or di la collega Sassa los (f) 7 Vin. Abr. 110. [b. a] pl. 3, q sidni vi con collega de liad el collega de la c

ment of every debt, for in such case interest shall again revive and be chargeable on the bankrupt or his representative (a).

Upon a question whether by the affignment of some thips and their cargoes by way of fecurity for a large fum of money lent, the property of the thips and cargoes paffed?

Lord (b) Hardwicke faid, it would be very detrimental to trade; as it would deter merchants from lending money, if, notwithstanding they should advance a large sum by way of mortgage, the property was not altered, but subject to the mortgagor's creditors under a commission of bankrupt, onless the ships returned before the commission was taken out, and the effects were in the actual possession of the mortgagees, that the construction of (c) stat. 21 Jac. c. 19. f. 10. (d) 11. was a point of very great confe-

(a) 2 Black. Com. 488. Att. Rep. 244. pl. 132.

(b) Aik. Rep, 156, 170.

(c) Which he faid was darkly penned. Att. Rep. 1 99. (d) " For that it often falls out, that many persons before they become hankrupts, do convey their goods to other men upon good confideration, yet fill do keep the same, and are reputed the owners thereof, and difpose the same as their own." Stat. 21 Jac. c. 19. f. 10. If therefore any bankrupt shall for the future, by the consent and permission of the true owner and proprietary, have in his possession, order, and disposition, any goods or chattels, whereof he shall be reputed owner, and take upon him the fale, alteration, or disposition as owner, the commissioners shall have power to sell

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quence, and he did not remember in the court of Chancery, or while he fat in the King's Bench, were (a) ever made a point in any cafe; that where bills of fale were made of goods and the purchaser suffered the bankrupt to continue in possession, it was plainly within the letter of the statute; but he did not think this could be construed to extend to a bare loan of money upon goods by way of morrgage, for the words in the clause are, for goods fold for a valuable confideration. and valuable consideration was most properly applicable to an absolute sale; that the original agreement was, not immediately to take possession of the ships and cargoes, but at a future day, and if the bankrupt had not a right from the time of the agreement, to exercise such power over them as he before had; but was now become fubject to the mortgage, then this case was not within the statute.

That there was nothing more common than affignments of ships, which were out upon their several voyages, as a security for money, and yet the affignce did not look upon it, that he had any property, but the affignor directed the master of the ships as to the voyage, and every thing necessary, and,

and dispose of the same for the benefit of the creditors. Stat. 21 Jac. c. 19. s. 11.

(a) Atk. Rep. 163.

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that if contracts of this kind had been confidered as falling within sect. 10. and 11. of stat. 21 Jac. c. 19 this case must have happened frequently, and would not have been the first time of it's being made a point in the courts in Westminster-ball.

Lord (a) Talket adjudged the following case, upon the particular circumstances of it, to be within stat. 21 Jac. c. 19. viz.

An owner of hoys mortgaged them, and after for doing was fuffered by the mortgage to use them for three years together, and had money lent him upon the credit of being owner.

Lord (b) Hardwicke, and also lord (c)
Mansfield were of opinion, that the above
clauses were never meant to extend to (d)
mortgages or pledges for money or goods,
because it was impossible in an assignment beyond sea, that they could be delivered over
to the assignment

. Stat. 21 | 16. C. 19. 1. 17.

<sup>(</sup>a) Auk. Rep. 157, 161, 171.

<sup>(</sup>b) Ath. Rep. 163. See you Isray Origin none

<sup>(</sup>c) 2 Bur. Rep. 941.

(d) In the court of Chancery mortgagees having much the largest share in the estate, are considered as exercise and having the property in it, and for that reason mortgages are not within the intention of this act. Ack. Rep. 164. Mr. just. Burnet. contra. Ack. Rep. 170.

# thereby may in claimed immediates

ien the mie becomes-the A. gives a promisory note for 2001. payable to B. or order, B. indorfes it to C. who indorses is to D. A. B. and C. became bankrupt, and D. received 5s. in the pound on a dividend made by the affignees of A. Lord chancellor (a) King ordered D. to come in as a creditor for 1507. only, out of B's effects mises workingo

Where drawer and indorfor are both become bankrupts, and the creditors have received a composition of six shillings in the pound under the commission against the indorfor, lord (b) Hardwicke at first feemed to think that they might fill prove their whole debt under the commission against the drawer, but upon looking into the above case and also another to same (e) effect [which see fol. 103. I he altered this opinion, and was very clear, that the fix shillings must go in discharge of so much of the debt, and that they could only prove the remaining fourteen shillings under the drawer's commise they had established was a very . aod

If a man draws a promisory note, before he becomes bankrupt, though it is not made

(b) Atk. Rep. 107.

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<sup>(</sup>a) 2 Wil. Rep. 407. pl. 129.

<sup>(</sup>c) 2 Wil. Rep. 89. pl. 21.

payable till after, yet it feems that the debt incurred thereby may be claimed immediately and (a) proved when the note becomes payable; otherwise the distinction of "debitum in præsenti, solvendam in future," would be (b) absurd.

Lord Hardwicke (c) admitted a person who took no more for the discount of notes than at the rate of five pounds per cent. per ann. to prove the whole amount of the notes, ununder a commission of bankrupt against the drawer, without obliging him to deduct what he had received of the indorfor for the difcount; and his lord(hip faid, that as the commissioners had established it as a rule, that note creditors had no right to prove interest upon them, unless it was expressed in the body of the notes, he would not break it upon the rule; for he faid, that even at law, where notes were for value received, and interest was not expressed, the jury did not give the plaintiff, in an action upon the notes, interest for them, but by way of damages only; and that commissioners of bankrupt could not award damages, and therefore the rule they had established was a very reasonable one

<sup>(</sup>a) May be proved before due, by 7 Geo. c. 31.

<sup>(</sup>b) See 2 Stra. 949. 2 Barnard, K. B. 251, 255. "Contingent Creditors," fol. 109.

<sup>(</sup>c) Aik. Rep. 150, 151.

man who has goods pledged to nim fe.

ey, before the Ankrupt y, need no.

Lord (a) Hardwicke said, that a packer might retain goods till he was paid the price and labor of packing, and that if he had another debt due to him from the same person, the goods should not be taken from him till he was paid the whole, notwithstanding the debtor was become bankrupt.

trader, being indepied on fimple con-An inhabitant of a parish was admitted a creditor on behalf of himself, and the other inhabitants, under a commission of bankrupt against a person, who had been for several years a collector of the land-tax and window-duty for the parish, on the balance of accompts for monies received by him in that capacity, from feveral parishioners, and not paid to the chamberlain of London; and lord Hardwicke (b) was of opinion, that one inhabitant might prove for himself and the rest of the parisbioners, because he might swear, that neither he, or the rest of the parishioners, to his knowledge or belief, had received any fecurity or fatisfaction. Partner. See " Joint and separate Creditors," fol. 149.

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pawns perty be rechaser fol. 12

(a) C (b) z (c) B

(d) 7 (i) Ai (f) A he has i Abr. 15

<sup>(</sup>a) Atk. Rep. 228. pl. 125. id. 237. (b) Atk. Rep. 111. pl. 62. 2 Kel. 291.

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A man who has goods pledged to him for money, before the bankruptcy, need not come in (a). For personal debts, where the creditor has a chattel in his hands, as a pledge or pawn for the payment, are entirely safe; (b), he having a property in the thing so pledged or pawned, precedent to the translation of the property to the commissioners, in which case they have only an equity of redemption, and are in no better condition than the bankrupt (c) himself.

If a trader, being indebted on simple contract, pledges goods for the payment, and promises interest, such creditors shall have interest, even between the act of bankruptcy,

and the commission (d).

Lord Hardwicke (e) said, that in cases of pawns, the pawnee had only a special property (f) in them, in case they should not be redeemed within the time required. Purchaser of land. See "Creditor by Judgment," fol. 125.

(a) Com Dig. 527.17 to the ent bas Helical

(b) 2 Black. Com. 487. Ack. Rep. 236.

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(c) Bac. Abr. 258.

(d) 7 Vin. Abr. 110. [b. a.] pl. 1. See ante 132, 133.

(i) Atk. Rep. 156.

ol. 124, 10 '017.

<sup>(</sup>f) A pawnbroker by reason of the special property he has in the pledge may assign it. One. 124. but Bac. Abr. 158. and Bulft. 31. seem contra.

Chap 3.

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If (a) goods be configured to a factor who sells them, the principal must come in under the commission; but if he lay the money out in other goods for his principal, he shall have the goods. So if the factor sell the goods for money at a future day, the principal will be intitled to the money (b).

meterin de la comita

The commissioners usually look upon the debts of the relations of bankrupts with a jealous eye, especially if they happen to be confiderable, and accordingly are much more nice in their examination of them, than they generally are of those of other creditors; the reason given for it is, that the affinity and connection between the parties, render the demand suspicious; we have often been much surprised at this partiality, (for such we cannot help calling it,) fince we have observed other circumstances equally suspicious as affinity and connection, in the demands of other creditors, pass unattended As to the largeness of the demand, who but relations would venture large fums?

(b) S. P. by lord ch, Hardwicke. 2 Vef. Rep. 586. id. 674. pl. 234.

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<sup>(</sup>a) Tri. at Ni. Pri. 40, 41. 2 Vef. Rep. 586. S.P. by lord chancellor Hardwicke.

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the relationship, though the only objection, is a full answer and reason for the commisfioners not being stricter than usual with them; because it is to be presumed relations, no more than ftrangers, would lend their money, if there was a likelihood of lofing it; when there is not, it is natural (though perhaps not prudent) to omit many of the legal formalities requifite on fuch occasions; besides, the debts of relations are commonly money lent, whereby their loss becomes much heavier than that of other creditors for goods fold and delivered, on which they have a very confiderable profit, in comparison to interest at 4 or 5 per cent. or perhaps no interest at all (a); but it may be thought, that relationship is such a fascination, that it will not helitate even at perjury.

It has been said, if you intimate to a relation, who is indebted to you, that he need not make himself uneasy on account of your demand, you never intending to trouble him for it, and afterwards he becomes bankrupt, that you are bound by such your intimation or promise, even to strangers, viz. to all his creditors; such an unjust and injurious attempt scarcely deserves notice, but as we know it has been made, and (we are forry to say it) met with much more coun-

(a) See 2 Wil. Rep. 429.

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tenance than it deserved, we will here give it an answer.

What motives has a relation to make fuch a promise to strangers? According to this construction, I may prejudice a relation and advantage a stranger, whose dividend by this means I may increase, and preclude myself the opportunity of figning a relation's certificate, and giving him the share of my divi-

dend under the commission.

We remember an instance of the aged mother of a bankrupt fon, coming to prove a debt under his commission; the other creditors objected to her demand, they intimated the notes were forged, that no consideration was given for them, and many other malicious allegations (for they were not on oath); upon this the commissioners, after having examined her very strictly, agreed to her being admitted; but this was not agreeable to the creditors, they therefore faid she had embezzled the bankrupt's goods, and till that was fettled to their fatisfaction, she ought not to be allowed to prove her debt; this occasioned another examination, though neither was this charge on oath; the mother faid in answer to it, that on her son's marrying some years ago, she removed to his house, which she furnished with her own goods she brought with her, and that as he was now bankrupt, she intended to take them back again where the thought proper; and

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and further, that she had lived with her son ever fince he was married, in the fame house in which her goods were: this case the commissioners mistook; for they seemed to think with the creditors, the clerk, and messenger to the commission (with the last of whom the quorum generally advises, and often forms his opinion and judgment) was a fraudulent possession within flat. 21 Jac. c. 19. f. 11. but to us it appeared to be the mother's possession of her own goods, and that the fon was never in. possession of them. On an application to lord (a) Hardwicke to fet aside a bill of sale of shop goods, &c. executed by a father to his fon previous to the father's bankruptcy, on a fuggestion that it was within the stat. 21 Jac. and therefore fraudulent as against creditors; he faid, there was no foundation for it, because it was many months before the bankruptcy, and followed by the possession of the son; we infer from this case, that if the son's possession gained him the property of his father's goods, that by fo much more reason, the mother's possession in our case, would secure to her the property of her own goods. Seller of land. See " Vendee."

<sup>(</sup>a) Aik. Rep. 93. pl. 41.

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Notwithstanding the rules of law, as to bankrupts, reduce all creditors to an (a) equality, yet the commissioners, in the case of fervants, always recommend the creditors to direct the assignees to pay them their full wages; lord chancellor Cowper (b) faid, it was unreasonable that servants should come in with the rest of the creditors; however, we think it prudent and safe for assignees. where the wages of fervants are very much in arrear, or where the fums demanded are too considerable to be esteemed the wages of menial servants, and consequently not within the recommendation of the commissioners; to advertize in the Gazette a meeting of the body of the creditors, in order to take their fense of the matter, to reduce it into writing, and to get it figned by the major part in value of fuch of them as attend the meeting; this procedure will be not only an authority, but likewise a justification and indemnity to the assignees, in case of any afterdisputes.

It has been said, that assignees can answer paying fervants one year's wages, but no more, without any particular direction from the creditors for that purpose; but we conceive this to be a mere vulgar notion, founded neither in reason or justice; to say, that

<sup>(</sup>a) 7 Vin. Abr. 127. Atk. Rep. 233.

the commissioners recommend the payment of all wages due to fervants, because it is hard for them to come in only for a share of the bankrupt's effects, with the other creditors, seems most absurd, if a fervant, whose wages are considerably in arrear, is not entitled to the benefit of the recommendation; since it may prove more beneficial to the fervant to receive a dividend on a long arrear

of wages, than one whole year's.

If there should happen to be occasion to prove the bankruptcy on a trial at law, it is most likely, that the trading and act of bankruptcy may be in the knowledge of the bankrupt's servant, and in his knowledge only; as therefore the evidence of the servant may prove of the last importance to all the creditors under the commission, it seems prudent for this reason, above all others, not to suffer the bankrupt's servants to prove their debts under the commission, but that they be paid the whole of their (a) demands.

A. and B. were fureties for one C. for the payment of money, and had counter-bonds to fave them harmless. The money was not paid at the day, and the fureties paid it, and afterwards C. became bankrupt; and whether they were creditors within the statute was the question; and it was resolved that

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<sup>(</sup>a) See Cas. Temp. Hardw. 265.

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they (a) were: and lord Hardwicke (b) faid, that the furely of a bankrupt who payed the debt, after disputing it some time, being put to an expence thereby, should, notwithstanding he disputed the payment of a just debt, be admitted to prove the expences of fuch fuit, under the commission against the principal.

Where (c) there is principal and furety, and furety pays off the debt, he is entitled to have an affigment of the fecurity, in order to enable him to obtain fatisfaction for what he has paid over and above his own share.

The debt of a petitioning creditor is subject to some peculiar qualities, to which that of other creditors does not feem to be, viz. it must be a legal (d) debt, it must be contracted (though it need not be (e) due) before (f) the act of bankruptcy committed; and therefore we apprehend that notwithstanding a commission of bankrupt is

<sup>(</sup>a) Cro. Jac. 127. pl. 17. (b) Aik. Rep. 262. pl. 41.

<sup>(</sup>c) By lord Hardwicke. Atk. Rep. 135. (d) Wil. Rep. 783. Sel. Cas. of Evid. 161. 2 Kel. 6. pl 8. 2 Stra. 899.

<sup>(</sup>e) Stat. 5 Geo. 2. 30. f. 22.

<sup>(</sup>f) Wil. Rep. 783. Caf. Temp. Talb. 243. Sel. Caf. of Evid. 147. 2 Stra. 744.

fuperfeded by reason of the petitioning creditor's debt not being a legal one, yet if a valid commission be afterwards obtained, such petitioning creditor will be intitled to (a) relief under it; as trustees, assignees of bonds, &c. who are not legal but only equitable creditors, and whose debts therefore will not intitle them to take out a commission (b). The cestui que trust ought to join in the deposition with his trustee, and the trust deed should be exhibited to the commissioners.

### V.

Mr. justice (c) Burnet said, that if a Vendee paid money, and did not insist upon a delivery of the goods, he consided in the credit of the vendor, and not in any real or particular security, and ought to come in, under the commission, as much as any other person who placed a considence in the bankrupt, and not in any other security.

A. (d) fells land to B. who afterwards becomes bankrupt, part of the purchase money not being paid, A. shall not be bound to come in as a creditor under the statute, but the land shall stand charged with the

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<sup>(</sup>a) Lord Raym. 287. 12 Mod. 159. Comb. 463.

<sup>(</sup>b) See 2 Vef. Rep. 252.

<sup>(</sup>c) Aik. Rep. 170. (d) Vern. 267, 268.

money unpaid, though there be no agree. ment for that purpose; for in this case there is a natural (d) equity, that the land should stand charged with so much of the bankrupt money as was not paid.

A creditor by verdiet, cannot be admitted to prove his debt, till after the expiration of the four day rule on the postea, because the defendant may within that time obtain a new trial, or fet afide the verditt; but fuch creditor may claim.

Lord Hardwicke (b) asked some of the commissioners of bankrupt who happened to be then present in court, whether if a person who had a verditt for his debt, and was profecuting to judgment, or had recovered (c) damages in the action, and was going on to execute a writ of enquiry, but before either of them was completed, a commission of bankrupt was taken out against the defendant, the costs and charges of such profecuting to judgment, or fuch affeffment of damages on a writ of inquiry had been allowed to be proved under a commission?

The commissioners informed the court that it was the constant practice to refuse such

(b) Atk. Rep. 140. pl. 81.

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<sup>(</sup>a) So faid by lord keeper North.

<sup>(</sup>c) Mr baron Aikyns must certainly have mistaken lord Hardwicke, for Damages cannot be recovered previous to a writ of inquiry.

costs being proved: and his lordship ordered accordingly.

## W.

Why may not wives under the bankrupt laws, which are to be construed most (a) beneficially for creditors, and under which the commissioners have an (b) equitable as well as a (b) legal jurisdiction, be deemed partners in favour of trade, and of their husbands, as for this purpose they are deemed (c) servants to them even at law.

The other material matters concerning ereditors feem reducible to the following particulars.

1. Joint and separate creditors, 149.

2. Mutual debts and credit, 156.

3. Interest, 168.

4. Exhibits, 170.

5. Claims, 172.

1. Joint and separate creditors, and hereia of partnership debts.

Lord (d) Hardwicke said, that formerly where there were several partners, they used

(b) Atk. Rep. 77.

(d) Atk. Rep. 138.

<sup>(</sup>a) 2 Show. Rep. 519, 520. 2 Eq. Cal. Abr. 97. Cal. Temp. Talb. 185. Stat. 21 Jac. c. 19. f. 1. Mar. 36.

<sup>(</sup>c) Cr. Car. 69. 2 Stra. 861. Black. Com. 430.

to take out separate commissions against each partner, as well as a joint commission: that this practice being of late thought a very unreasonable one, as occasioning great confusion, with regard to bankrupt's effects. had been (a) discountenanced, and besides they

(a) By this opinion of ford chan, Hardwicke, it should feem that for the future, where there is a joint commission depending, separate creditors ought not to take out a separate commission, but apply for an order to be admitted to come in, and prove their debts under the joint commission, as being a means of saving an expence to the creditors. By the Reporter. Atk. Rep. 138. See id. 98. pl. 46. Francis Capper, Efq. formerly a commissioner of bankrupt, on his examination, before a committee of the honourable House of Commons, to whom the petition of several bankrupts was referred, observed, that joint-commissions frequently issued against partners, as well as separate, in their private rights, that there being no positive statute for marshalling the joint and separate effects, thereby directing the joint creditors to be paid out of the joint estate, and the separate creditors out of the separate effects, which difficuty occurring early to the Great Seal, the arbiter aqui, hath adopted the above method, to prevent the double expence of taking out two commissions against the same person, for which purpose, upon the application of the different classes of creditors, the Great Seal orders both forts of creditors to come in and prove their debts, under one and the same commission, but fubject to the commissioners taking an account of the joint and separate estates, distinguishing the one from the other; so that the joint creditors may be paid out

of the joint, and the separate creditors out of the separate estate: and if any furplus of either, the same to be carried to the account, and in aid of the deficient

estate; viz. the surplus of the separate, to be brought

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they were generally nothing more than a struggle for the assigneeship and the clerk-ship.

Lord (a) Hardwicke said, that where there was a creditor on bond against two persons jointly and severally, and both became bank-rupt, he was entitled to receive a satisfaction out of the joint estate, and if the joint estate

into the joint estate, to fatisfy all the joint creditors, because a commission, in the first instance, is in nature of an execution, and the joint creditor may take his remedy against either estate or both; if there is a furplus of the joint estate, and any separate creditor be unpaid the bankrupt's share of his joint estate, it is to. be applied in discharge of his separate creditors only \*. If this provision was made by statute law, Mr. Capper apprehended it would fave the parties interested in the commission, the great expence of applying to the Great Seal, and the petitioning creditor, in particular, all his expences which are not allowed him out of the bankrupt estate, the order of court extending only to the relief of the creditor applying; he further observed, that several distinct applications, in respect to one and the same commission, are frequent; and that creditors of both kinds, would also have the benefit of voting in the choice of affignees, and of opposing figning the certificate of conformity, which they are frequently deprived of, under the order of court, from its not being obtained in time. See the Report, dated 2 June 1759, 32 Geo. 2. in Com. Journ.

If the messenger was not authorized to seize both estates, be the commission joint or separate; or if the bankrupt was not obliged to discover both his estates on his final examination, the above order would prove totally nugatory.

(a) Atk. Rep. 99, 106. pl. 57.

<sup>·</sup> See 3 Wil. Rep. 25, 405.

Chap. 3. fell short, he was for the residue entitled to a satisfaction out of the separate estate : but then the court would put him to his (a) election, and if he elected to come under the joint estate, he would, with respect to a fatisfaction for the residue, be postponed (b)

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(a) Lord Talbot declared, that bond creditors to whom the two bankrupts were jointly and feverally bound, were not entitled to have a full satisfaction out of both at the same time, and ordered them to make election before they received any farther dividend. In a like case his lordship declared, that such creditors were not entitled to a fatisfaction equally with other creditors of the joint estate, or with other creditors of the separate at the same time, but ordered them to make an election, and if they elected to come upon the joint estate, then they were not to come upon the separate estate, till the other creditors upon the separate eftate had been first paid. Atk. Rep. 99.

(b) Lord Hardwicke faid, that to be fure at law a creditor upon a joint and feveral bond may proceed against both obligees at the same time, till his debt is fully satisfied; but in bankrupt cases the court of Chancery directs an equality of fatisfaction : consider it (said lord Hardwicke) on the sooting of a joint estate first; joint creditors are entitled to a satisfaction out of the joint estate before separate creditors, but then they have no right to come upon the separate estate for the remainder of their debts, till after separate creditors are fatisfied; what would be the consequence, if creditors upon joint and several bonds should be admitted to come upon both estates at the same time? Why, then thefe creditors would draw fo much out of the separate estate as would be a prejudice to other joint creditors, who have an equal right to come upon the separate estate with themselves, and by that means his lordship should

to all the creditors of the separate estate. And his lordship (a) said, that joint creditors, where there were no separate, might exhaust both the joint and separate estate, till their debts were paid, and that the bankrupt would not be entitled to a shilling till the joint creditors were fully satisfied; but that where there were separate as well as joint creditors, though in the case of the bankrupts, the separate estate should be equally applied; yet as between joint and separate creditors it was otherwise, for the joint estate should be applied to the satisfaction of the joint, and the separate estate to the satisfaction of the separate creditors.

Lord (b) Hardwicke said, that where there were two persons who had been partners,

should give creditors upon joint and several bonds, a preserve to other creditors, when the act of parliament, and the equity of the court of Chancey incline that all persons should have an equal satisfaction. A.k. Rep. 99, 100. Lord chancellor sounded his order upon this reasoning, because the bond creditors might have brought a separate action at law against each of them, and might have had likewise separate executions, but could not have levied his debt upon both the estates at the same time, but only for the desciency, where one estate was not sufficient to satisfy the whole. Ask. Rep. 106. pl. 57. By this last reasoning his lordship seems to maintain a contrary doctrine to what is advanced by him in the former part of this note, as to the point of law.

<sup>(</sup>b) Atk. Rep. 227.

<sup>(</sup>b) Atk. Rep. 98. pl. 46. See fol. 139. Note (b).

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and yet the commissions were taken out against them as separate traders, their creditors upon the joint estate could not be admitted to prove their joint debts under each commission, for they had an equitable right, in case there should be any surplus of the estates of the two bankrupts, after the separate creditors were fatisfied; and that therefore the joint creditors must proceed in the common course, by taking out a joint commiffion.

Where A. lent a fum of money to one partner on his own fecurity, and he lent the fame to the partnership trade, and a joint commission taken out; lord (a) Hardwicke faid, that A. should not come in as a creditor upon the joint estate of the bankrupt (b) immediately and directly, with the rest of the partnership's creditors, but that by way of circuity he was entitled, as standing in the place of that partner who had paid the money to the use of the partnership trade.

Where (c) there were two partners, and one had taken out more money from the partnership stock than his share amounted to, and thereby became a debtor for fo much; ford Talbot was of opinion, that the partnership creditor had a right to come upon the

(c) Atk. Rep. 225.

separate.

<sup>(</sup>a) Aik. Rep. 223. pl. 124.

<sup>(</sup>b) Unless such separate debt had been entered in the partnership books, and then he might. Ark. Rep. 84.

Two (a) partners agreed to borrow a fum of money for the use of the partnership, but one of them only gave a bond for securing the payment, and the other was a witness to it, this money was afterwards entered in the cash-book of the partnership, a joint commission was taken out against them, and the obligee denied by the commissioners to be admitted a creditor; but lord King, on his petition, was of opinion, that he ought to be admitted, and directed accordingly.

Separate creditors are allowed to come in under a joint commission, but the joint effects are first to be applied to pay the partner-ship debts, and then the separate debts, and as to the separate effects, first the separate creditors, and afterwards the partnership creditors, are to be paid out of the same (b).

Lord chancellor Hardwicke said, that the commissioners had no power of admitting separate creditors to prove debts under a joint commission without the sanction of the court (c); and (d) he laid it down for a rule, that where there was a joint and separate commission, a creditor under the joint com-

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<sup>(</sup>a) Aik. Rep. 225.

<sup>(</sup>b) Aik. Rep. 67. pl. 22. 2 Vern. 706. pl. 628. 2 Wil. Rep. 500. 3 Wil. Rep. 25. 2 Vef. Rep. 456.

<sup>(</sup>c) Att. Rep. 68. pl. 23.

<sup>(</sup>d) Aik, Rep. 97. pl. 45. 98. pl. 46.

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mission might come under the separate, and affent or diffent to the certificate of the bank. rupt under the separate commission (a).

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the law, his office being merely Where (b) it shall appear to the commisfioners, that there hath been mutual credit given by, or mutual debts between the bankrupt, and any other person, at any time before the bankruptcy, the commissioners, or the bankrupt's aflignees, shall state the accompt between them, and one debt may be fet against another, and what shall appear to be due on either fide, or the balance of fuch accompt; and on fetting such debts against one another, and no more, shall be claimed or paid on either fide respectively (c)

Neither the commissioners or the assignees, in the opinion of lord chancellor (d) Hardwicke, can admit a debtor to a bankrupt before his bankruptcy, and a creditor to him. upon a contingency that took place after the bankruptcy, to fet off under this clause; yet in order to do the parties substantial jus-

e an ad of their co

<sup>(</sup>a) 3 Wil. Rep. 25. (b) Stat. 5 Geo. 2. c. 30. f. 28. which hath always received an equitable construction, and therefore all debts under that act are confidered alike. Rayn. Read, on Stat Geo. 2. 27. note (1),

<sup>(</sup>c) So before this flatute, by Hale and North, ch. just. Com. Dig. 535. 2 Pern. 117. pl. 114. S. P.

<sup>(</sup>d) Atk. Rep. 119.

tice, such set-off ought to be allowed; but the words of the act being, as above set forth, mutual debts before the bankruptcy, and a judge having nothing to do with the reason of the law, his office being merely ministerial, and solely to declare what the law is, not what it should be; no court of justice can do substantial justice, that being the peculiar and sole province of the legislature.

This same defire of doing substantial justice, induced the late lord ch. just. Lee, (a magiftrate eminent for a found heart and head) to misdirect a jury, in a cause at nisi prius, on this very fame point, for his lordship confidering that it might be dangerous to inquire into the precise time of indorsing negotiable notes, directed the jury to allow a promifory note indorsed to a debtor of a bankrupt, after the bankruptcy, to be fet off; which with much difficulty, and merely in deference to the opinion of so able and upright a judge, they did; but upon a new trial that (a) court would not allow fuch note to be fet off, for belides fuch indorfee having no right to be in a better condition than the drawer, who could only come in for a dividend, and the words of the act being

<sup>(</sup>a) It was with the concurrence of the chief justice but the court gave no opinion, how it would have been, if the nature of the transaction, and the time of the actual indersement, had not appeared. 2 Stra.

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Chap. 3. mutual debts between the bankrupt and " any other person, at any time, before such " person became bankrupt," it would also be of ill consequence to trade, if debtors to bankrupts estates should be allowed to buy up debts, in order to fet them off (a).

Verney, (b) master of the rolls, was of opinion, that where there were mutual demands, between a creditor and a bankrupt, under 5 Geo. 2. c. 30. f. 28. that upon an action at law, defendant might set off his demand against the assignees (as is done in other cases, by 2 Geo. 2. c. 23. f. 13. and 8 Geo. 2. c. 24. and that there is no occasion to come into a court of equity, to pray an injunction to a fuit at law, and for affignee to account.

Lord chancellor (c) Cowper said, that where there was mutual credit between a bankrupt and a creditor, the balance should only be paid, and that the clause in the statute was not to be construed of dealings in trade only, or in case of mutual running accompts, but also where one credit was upon mortgage, and the other upon note; and he faid, that in all cases of mutual credit, it was natural justice and equity, that only the balance should be paid.

(b) 2 Tr. Atk. Rep. 42. pl. 40.

(c) Wil. Rep. 326.

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<sup>(</sup>a) Bul. Ni. Pri. 176, 177. 2 Sira. 1235.

Sir Stephen (a) Evans, in the year 1711, had 5000 l. stock in the Hudson's Bay company, and was their banker or cashier, and upon that accompt was indebted to the company in 800 L and foon after became bankrupt; the affignees brought a bill against the company to have the 5000 l. flock transferred to them, with all dividends due thereon: the company by their answer infifted upon the above clause of the statute 5 Geo. 2. and that Sir Stephen Evans having credit in their books for 5000 l. stock, and the company on the other fide having credit in Sir Stephen Evans's book for 800 l. they ought to deduct and have an allowance of the 800 l. out of the 5000 l. stock.

It was argued for the defendant that this case was within the clause of the statute of mutual credit, &c. and that Sir S. E. was a creditor of the company for his 5000 l. stock, and the company a creditor of Sir S. E. for the 800 l. due to them; that the stock was called credit in the books of the company, and that he had a demand against the company for the interest and produce of the stock, and though there was nothing due to Sir S. E. for dividends at the time of his bankruptcy, yet the stock itself was a debt from the company, and so within the clause of the act of setting one debt against an-

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<sup>(</sup>a) 7 Vin. 125. pl. 2.

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other, and only the balance due to Sir S. E's affignees; that it would be very unreasonable where there were mutual dealings and credit, that the debtor of the bankrupt should be bound to pay the whole due from him to the bankrupt's estate, and he, e contra, should only come in as a creditor under the commission for all due to him, and receive, perhaps, only two or three shillings in the pound for his whole debt, &c.

Lord chancellor (a) King thought that this case was within the clause of the statute of setting off debt against debt; that there was mutual credit given, and therefore thought the company might retain the 800 l. due to them, out of the dividend due to the bankrupt's estate, subsequent to the bankruptcy, and should not be obliged to come in as a creditor under the commission, and decreed

(b) accordingly.

Lord (c) Hardwicke said, that under stat. 5 Geo. 2. c. 30. s. 28. persons might set off debts, as that act extended to all mutual

(a) 7 Vin. Abr. 127.

(c) Atk. Rep. 185.

debts,

<sup>(</sup>b) Raymond, ch. just. and Mr. Baron Price, who assisted his lordship, gave no direct opinion, but seemed to agree with the chancellor. 7 Vin. Abr. 127. But Sir John Strange says, that the court was of this opinion. Stra. 645. And Eq. Cas. Abr. 9. expressly says, "decreed per lord chancellor, assisted by Raymond, C. J. and Mr. justice Price," without observing, that either of the judges differed.

debts, though independent of, and not relative to the mutual credit between the bankrupt and other persons in the course of trade, and though the debts were of such a nature as could not be brought into a general (a)

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His (b) lordship said, that the clause in the act of parliament of the 5 Geo. 2. c. 30. relating to mutual credit, had received a very liberal construction, and there had been many cases which that clause had been extended to, where an action of accompt would not lie, nor could the court of Chancery upon a bill decree an accompt; that it was very hard to fay that mutual credit should be confined to pecuniary demands, and that if a man had goods in his hand belonging to a debtor of his, which could not be got from him without an action at law, or bill in equity, that it should not be considered as mutual credit; and lord (c) Cowper's opinion plainly favoured that construction, for he looked upon the jewels pawned, and notes given, as an accompt current between

<sup>(</sup>a) He said the clause in the act of 5 Geo. 2. relating to mutual accompt, had been carried to be sure further, and rightfully, than a mere matter of accompt, but that he did not know that a court of equity had gone further than the courts of law in the cases of a set-off, which was surther, indeed, than cases of accompt. Ask, Rep. 237. See fol. 145. in notes 154, 155.

<sup>(</sup>b) Aik. Rep. 229. (c) 2 Vern. 691. pl. 616.

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them; and that, though, if there had been no bankruptcy, in an action for the goods in question, the debt could not have been set off, yet as the clause of mutual credit had been extended, lord *Hardwicke* thought it might come within that rule, especially as there was an accompt between them.

A creditor of the bankrupt, and a debtor to him, upon bond, payable at a future day with lawful interest, petitioned lord (a) Hardwicke, that he might set off his demand against the principal and interest due on the bond, as far as it would go, and not be obliged to prove his debt under the commission, and take a dividend upon it only.

Lord (b) chancellor said, that before the making stat. 5 Geo. 2. c. 30. s. 28. if a perfon was a creditor, he was obliged to prove his debt under the commission, and received perhaps a dividend only of 2 s. 6 d. in the pound from the bankrupt's estate, and at the same time pay the whole to the assignee of what he owed to the bankrupt; that to remedy this great inconvenience the act was made; suppose, for instance, said lord Hardwicke, there had been a bond from the bankrupt to A. payable at a future day, and a debt owing from A. on simple contract to the bankrupt for a less sum, the accompt between A. and the bankrupt should first of

<sup>(</sup>a) Atk. Rep. 230. pl. 126.

<sup>(</sup>b) Atk. Rep. 231.

all be stated, and one debt set against the other, and A. should be entitled to a proportionable dividend of fuch bankrupt's estate, pro rata with the other creditors, " discompting the bond payable at a future time, after the rate of 5 per cent. for what he should so receive, to be computed from the actual payment thereof, to the time such debt should or would have become payable in and by fuch bond." These are the words and the conclusion of the clause in the statute of 7 Geo. c. 31. relating to creditors whose debts are payable at a future

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Consider it then (continued his lordship) the other way, where A. is a debtor to the bankrupt by bond payable at a future day, and a creditor upon his estate by simple contract for a less sum, would it be just and equitable that he should be obliged to prove his debt under the commission, and receive perhaps I s. only in the pound, and yet when his bond becomes due, which in some instances might be in three months only, pay the whole debt, principal and interest, to the affignee under the commission? This might indeed in strictness be said not to be a mutual debt, but was it not a mutual credit? The bankrupt gave credit to the petitioner in confideration of this bond, though payable at a future day: and the petitioner gave the bankrupt credit for the debt he owed

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owed the petitioner upon simple contract; and therefore he thought this case was within

the equity of the 5th of Geo. 2.

164

The plaintiffs were affignees under a commission of bankruptcy awarded against Sir Justus Beck, and brought this bill against the defendants, to compel them to affign and transfer to the plaintiffs several shares in their stock, to which Sir Justus Beck was intitled, and which in the year 1720 cost him between 10 and 12000 l. The defendants by answer insisted, that Sir Justus Beck was one of the directors of their company, and that in the year 1720, after his purchase of the before-mentioned stock, the company lent him about 12000 l. and infifted, that they ought not to be obliged to let the plaintiffs transfer or dispose of the interest which Sir Justus had in the stock, without payment of the 12000 l. borrowed, and that by virtue of the act 5 Geo. one account ought to be fet off against the other; and for that purpose they had come in as creditors under the commission of bankruptcy, and had proved their debts; there was no pretence that the money was lent on the fecurity of the stock; but it was infisted, that on the credit of the great parcel of stock, which Sir Justus had in their company at that time, that they lent him this money, and therefore would now stop his stock till payment thereof, or as far as the value of the stock would extend,

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extend, which now by the great fall of stocks would by no means fatisfy their debt; but it was decreed at the Rolls, and that decree on an appeal affirmed by lord (a) chancellor King, that the defendants ought to permit the plaintiffs, the affignees, to transfer and difpose of the stock for the most they could make of it, and that they could not stop or retain the stock for their fatisfaction, either before or by virtue of the statute 5 Geo. And though the company had the whole flock of it in them in their corporate capacity, yet the stock of each proprietor was diffinct, and vefted only in himself, with which the company had nothing to do further than they were vested therewith by the charter, or act of parliament with which they were incorporated and impowered, or ordered to transfer each one's flock by transfers to be made in the books of the company; which otherwise every proprietor might by deed, or otherwise, have transferred as he thought fit. And it was held, that this case differed from the first case, sol. 159. And it was faid, that this was not like the case, where a (b) banker lent 200 l. on a pledge of jewels, and afterwards lent the same person a further sum of money on his bare note; yet he was not admitted to re-

<sup>(</sup>a) Eq. Cas. Abr.

<sup>(</sup>b) Ch. Pr. 419. pl. 279. 2 Vern. 691. pl. 616. See. Atk. Rep. 229. 236.

deemothe diewels without payment of the more likewife; for there it was between two brivate perfons. Mad it was held not to be withing the statute of 5 Geo which speaks daly of mutual dealings and accompts, which is not this cafe, as Sir Jufius had a fixed permanent interest in the stock ; and the money borrowed without regard thereto. And the court held this was not like the case of partnership, where if any of the partners borrowed any of the partnership's money, his own fhare should be answerable for it, and he should not be permitted to come into a court of equity, and pray an accompt of his thate of the partnership, stock, and effects, without making fatisfaction for the debt he owed to the partnerships for this was a transaction between them as private persons, and on a mutual credit and truft; but the loan of the 12000 L in the present case to Sir Justus, was not in their corporate capacity, wherein only he flood related to them, and held this flock, but was a loan by them as private persons, for which they could not ftop his stock, which he held as a member of the company in their corporate capacity.

Where (a) there are mutual debts between the plaintiff and defendant, or if either party fue or be fued as executor or administrator,

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s Geo. 2. c. 24. f. 4, 5, 19 W. A. S. Perpetuated by flat.

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where there are mutual debts between the testator or intestate and either party. one debt may be set against the other, and such matter may be given in evidence upon the general issue, or pleaded in bar, as the case shall require; so as at the time of pleading the general issue notice be given of the particular sum or debt intended to be insisted on, and upon what accompt it became due.

Lord chancellor (a) King was of opinion, that joins debts could not be set off against a separate demand due to the bankrupt; but if both demands had been separate, he thought that mutual credit, within 2 Geo. 2. c. 22. s. 13. and that though the statute speaks only of setting off one debt against another on trials, yet commissioners (b) of bankrupt were within the equity of the act, and might allow mutual debts being given in discharge upon the demands of assignees.

Plaintiff being residuary legatee and surviving executrix of her husband, to whom two persons had given a joint bond for payment of money, one of whom was dead, and plaintiff being indebted upon her own private account to the surviving obligor, who

<sup>(</sup>a) zi Kidi Rep. 24. phagastob bas Anaisla

hath fince held, that the whole court of King's Bench hath fince held, that the clause of the statute does not extend to commissioners of bankrupt; which opinion lord chancellor Appley seems to adopt. See Wil. Rep. B. K. 155, 156. Bul. Ni. Pri. 177.

Chap. 3. was become bankrupt, brought her bill in Chancery, for liberty to fet off what was due to plaintiff, as executrix, and against the debt due from herself to the bankrupt. Lord (a) Hardwicke said, that he never knew such instance in Chancery before, and that as the debts were due in different rights, the case was not within this clause of the act of parliament, there being no mutual credit between the parties; and his lordship obferved, that this matter had been determined 2d. April 1748, on parte Hope; and further, that if Chancery was to go into inquiries of this fort, an account must be taken of the testator's whole estate, till it were seen, if there was a furplus, so as thereout to make a fet-off; and also, that another consequence would arise; it having been often doubtful when executors could take a refidue, which might draw on infinite expence, if it should be allowed of, in like instances. head fund, and an (ach a Trepwreck, if there is a fals.

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he declared the As to fuch interest as any particular creditor may be entitled to, by virtue of his lien or fecurity on the bankrupt's estate, we refer the reader to our alphabetical (b) arrangement of creditors, is drive salie as a sale on the equitably power given the commissioners by

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<sup>(</sup>a) 3 Tr. And. Rep. 691. pl. 261. (6) Fol. 132, 139, 141.

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For debts on specialty, the creditors shall have interest as well between the act of (4) bankruptcy as before, and (b) though the usual (c) rule is, that all interest on debts carrying interest shall cease from the time of issuing the commission; yet when a bankrupt's estate is sufficient to pay every debt, with a large surplus left, creditors, whose debts carried interest shall be allowed inteterest for their respective debts, from the time the computation of it was stopt by the commissioners, and the bankrupt or his representatives will be chargeable therewith,

(a) 7 Vin. Abr. 110. [B. a.] pl. L.

(b) Atk. Rep. 244. pl. 132. 2 Black. Com. 488.

(1) All creditors come under the terms of the commission, which is to have interest no farther than he time of iffuing the commission. Atk: Rep. 79 7 Fie. Abr. 70. in a note to pl. 7. The commissioners, after a man becomes bankrupt, computes interest upon debts no lower than the date of the committion, because it is a dead fund, and in fuch a shipwreck, if there is a lalvage of part to every person, it is as much as can be expected in such a general loss. 2 Ack. Rep. 528. Lord Hardwicke declared there was no such rule, as allowing interest no farther than the time of issuing the commission, and that there was no direction in list. 21 Jac. c. 19. f. g. for that purpose, and that the practice had been used only as the best method of settling the proportion among the creditors, that they might have a rate-like fatisfaction, and that it was founded upon the equitable power given the commissioners by the statute. Atk. Rep. 79. See id. 244. pl. 132. TILL OF I OF L SO I SO

yond their (a) penalties (b).

Where (c) there is mutual credit between a bankrupt and a creditor, the commissioners ought to stop interest on both sides at the time of the bankruptcy, or compute interest

on both till lettling the accompt.

Lord (d) Hardwicke faid, there was a plain distinction between debts that carried interest, and a special deposit of goods and stock, for that in the former case the interest should be carried down to the date of the commisfion; but that in the latter it was otherwise, for the interest stopped from the time of the deposit, and a calculation should be made of the value of the whole entire thing depofited both principal and interest, be it stock or goods, according to the market price at the time of the depolit, and that interest was not to run on as in the case of a simple part with them till he is fatisfied his descape

far as such liensenididxHod, and if after such latisfaction any part of his debt remains un

101 If alieredicor has any fecurity for his debt, as a bond, hove of hand, bild of exchange, this matter we refer the reader to " Creditor

29774 Lord Hardewicke daid, that flat uz by ac. vg. 199. the penalty as against creditors, and not as against the bank upt bimself. Ask. Rep. 78. If the act of bank of Rep. 78. Aik. Rep. 78.

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deed, or judgment, fuch door, quar . sike (s) be 191 (4) Att. Rep. 259. pl. 139. See fol. 128, 129. &c. 3.

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&c. he must produce them to the commisfioners, who are to indorse or underwrite them thus:

of June, 1768. Exhibited to us under the commission of bankrupt against A. B. This the three acting commissioners are to figa; and this indorsement is called an Exhibit.

If a person acts for another creditor under a commission of bankrupt, he must produce his authority, as letters of administration, of attorney (with an affidavit of the execution), probate of a will, &c. in order to satisfy the commissioners that the party has a legal authority to act for his principal, these also are to be exhibited to the commissioners.

If any creditor has a lien on the bankrupt's estate as a mortgage, pledge, execution, bill of sale, &c. he is not obliged to
part with them till he is satisfied his debt as
far as such liens will extend, and if after such
satisfaction any part of his debt remains unpaid, he may come under the commission for
the residue, but for surther particulars as to
this matter we refer the reader to "Creditor
"by Execution" "Mortgagee," Pawnee,
"acc." in our alphabetical arrangement of
creditors.

If the act of bankruptcy be a fraudulent deed, or judgment, such deed, &c. most be

1729 ad rotil Proof of Delis. sarge Chap. 3. exhibited to the commissioners, that they may judge whether it be fo far fraudulent, as that the execution of the one, or confessing the other, was an act of bankruptcy.

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Sonoa bankrupt's slaft examination, all his books, papers, writings, decurities, and liens on the effates or goods of other perfons, ought to be exhibited to the commissioners, to shew he did not secrete any part of his estate or effects, at the time of his examination. See more under "Depositions" in the Appendix.

## 5. Claims.

an affidavit of the

Where a creditor cannot afcertain his debt fo as to swear to it, or is not able to produce his fecurity, or where a person who acts in right of another cannot thew his authority, in these cases the commissioners usually allow fuch persons to enter a claim, but he will not be entitled to a dividend of the bankrupt's estate till it is established by proof on oath which if the claimant cannot do by the day whereon the commissioners declare a dividend, the claim will be struck out of the proceedings, unless he gives some very good reason, to be allowed by the commishoners, for the neglect; yet fuch claimant may even afterwards swear to his debt, but the will then lofe the first dividend, unless the creditors (the assignees having sufficient Louisin XI

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in hand) agree, that such creditor be paid the first dividend; if they resuse, the Great Seal will order it on petition, but it will be on this special condition, viz. that it does not break in upon the former dividend, for it would be very unreasonable indeed to oblige those creditors, who have been no ways in fault, to resund to a creditor who has been guilty of the most gross neglect in his own affairs.

## CHAP. IV.

The Appointment, Choice, and Removal of the Assignees.

THE commissioners (a), as often as they shall see cause, for the better preserving and securing the bankrupt's estate, may immediately appoint one or more assignee (b) or assignees of the estate and effects or any part thereof.

(a) Stat. 5 Geo. 2. c. 30. f. 30.

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(b) But they are removeable by the creditors at the choice of assignees, and liable to forfeit 200! with full costs of suit, in case upon removal they neglect upon notice to deliver to the new assignees the bankrupt's estate and effects. Stat. 5 Geo. 2. c. 30. s. 30.

Lord:

ods Lord Hardwicke (a) faid, that though there might be occasion sometimes for temporary afignments, for the better preferring the bankrupt's estate, yet commissioners were not obliged by the above clause in the statute relating to temporary affignments, to appoint an affignce of the whole estate, because the words are in the disjunctive " immediately to appoint one or more affignee or affignees of the estate and effects, or any part thereof." And further, that as by leaving out the copyhold estate of a bankrupt in a temporary affignment, the creditors would run no risque with regard to the crown, for an extent would not affect it, it would be adviseable to omit them in subsequent affignments

It is usual for the commissioners previous to the choice of assignees (in order to prevent any restection being cast on the characters of the assignees as doubting their credit) to desire they will agree among themselves, in whose hands the monies arising from the bankrupt estate, as often as the assignees shall receive 100% thereof or upwards, shall be placed pursuant to the following statute.

the choice of affiguees, the major part in vatue of the creditors present thall, of they

<sup>(</sup>a) Stat. 7 Geo. 2. c. 30. f. 38. (b) Lord frank (c) (c) Lord frank wicke has directed of gent Where to get of the mointes which are lodged in the hands of singues and widened is made, of 10700 7

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think aft; direct how, and with whom, the monies to be received out of the bankrupt's eftare fill remain until the fame be divided, to which rule the affiguees that conform as often as 100 l. that he got in, and they that he indemnified (2) and they that

fried as usual for some of the commissioners to add, that though the bank (b) of England is express directed by the above clause to receive the bankrupt's estate, yet that the bank do not think it worth their while to open an accompt for that purpose, and refuse so to do. We always considered this declaration a very extraordinary one, even when we had no doubt of the truth of it; we thought it rather indecent for gentlemen invested with so great power and authority as commissioners of bankrupts are, to declare ex officio, that one of the most respectable

assignces do sometimes delay the dividing thereof, to the very great prejudice of the bankrupt's creditors, for preventing whereof, and to the end assignces may make speedy dividends of the clate and effects of such bankrupts, it is enacted as above." Preamble to the above clause. In order to enforce the execution of this law, it is adviseable that there should be a covenant from the assignces to the commissioners, in the assignment, and also in the bargain and sale, that they will pay the money into such hands as the creditors shall direct.

(a) Stat. 5 Geo. 2. c. 30. f. 32.

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<sup>(</sup>b) Lord Hardwicke has directed affiguess to deposit the money arising from the fale of the bankrupt effects in the bank in their name. Mr. Rep. 133

corporations in the kingdom, instituted, continued, and supported by parliament, peremptorily declined to obey the express injunctions of the legislature; but as neither the Bank nor any other particular place is mentioned in the act, it is a matter of aftonishment to us, how the above declaration has passed so often unnoticed, or unanswered We have observed the commisat Guildhall. fioners often express themselves very tenacious of, and zealous for the dignity of the Great Seal, and of the respect due to them as acting under it; fuch zeal may be very proper, but we must confess we think as much regard at least is equally due to their oath of office, under which they also act, and whereby they have fworn that they will, " according to the best of their skill and knowledge, execute the feveral powers and trufts reposed in them, as commissioners of bankrupts." Now it feems certain, that they have either not even so much as read, or if they have, that they cannot retain or do not underfland the bankrupt statutes; if so, are they. those judicious persons whom my lord (a) Coke fays they ought to be? Or what is more material, have they used their endeavours fo to be, according to their promise made by them on oath? Though we may be thought rather too fevere to declare fuch persons in-

<sup>(</sup>a) 4 lnft. 277.

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capable to be any longer commissioners; yet lord (a) Hardwicke was pleased to remove commissioners for taking more than their fees, and ordering monies to be charged for their eating and drinking, but what were those misdemeanors in comparison to the above?

The commissioners (b) shall forthwith, after they have declared the person, against whom the commission shall issue, bankrupt, cause notice thereof to be given in the London Gazette, and shall appoint a (c) time and (d) place for the creditors to meet, in order to choose assignees of the bankrupt estate and effects.

So (e) that they are immediately to appoint a time and place for the choice of assignees, because it may be necessary to take care of the bankrupt's estate and essects; and it must not be laid down as a rule, that, because some of the creditors are abroad, and beyond sea, therefore they must at all events

(a) 7 Vin. Abr. 77 pl. 3.

(b) Stat. 5 Geo. 2. c. 30. f. 26.

(c) Which time we think ought always to be fourteen days at least from the notice in the Gazette, of the issuing the commission, in order to give all the banksupt's creditors, in whatever part of the kingdom they may happen to reside, an opportunity of being present at, and of voting in the choice.

(d) Which meeting for London, and all places within the bills of mortality, shall be at the Guildhall of the

faid city. Stat. 5 Geo. 2. c. 30. f. 26.

(e) By lord Hardwicke. Aik. Rep. 92.

have

have an opportunity of voting in the choice, and the creditors be directed to proceed to a new one; if this was to prevail, the choice must be postponed to a great length of time, which would be directly contrary to the act of parliament; and therefore the rule is, that the assignees ought to be continued, unless some objection can be shewn with regard to the substance or integrity of the person who is chosen assignee, but it would be adding to the expence, to make two choices of assignees instead of one.

Precedents were searched, but no case could be found, where it had been ordered, that creditors should proceed to a second choice, upon a suggestion, merely, that some of them lived remote from London, or were out of England, and besides it would be a dangerous rule, and therefore lord Hardwicke continued the assignee who was already

chofen.

Lord chancellor (a) Hardwicke said, that the commissioners upon the day for choice of assignees, were not critically to examine into the debt, but to admit creditors upon their (b) oath for what they swore was due to them, as they would still be liable to an accompt afterwards, and that besides, it would be extremely hard to exclude persons who

<sup>(</sup>a) Aik. Rep. 70, 71. (b) Aik. Rep. 153. pl. 92.

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might perhaps be the greatest creditors, till the accompt was settled, which might be the work of several years, and it might be necessary and convenient, that assignees should immediately be chosen, and besides, that it was not necessary that the assignees should have proved any debts under the commission, or that they should be even creditors at large of the bankrupt.

The (a) commissioners shall at this meeting ascertain the costs and expences of suing forth and prosecuting the commission, and by writing under their hands shall direct and order the assignees of the bankrupt's estate, to pay and re-imburse the petitioning creditor his costs and charges, out of the first monies or essects of the bankrupt, that should be got in and received under the commission.

"Whereas (b) it may be found necessary, that as well affignments of bankrupt's estates already made by commissioners, as affignments hereaster to be made pursuant to the choice of creditors, should be vacated, and new affignments be made of the debts and effects unreceived and not disposed of by the then assignees, to other persons to be chosen

4) Ad. Rep. 70, 75-

<sup>(</sup>a) Stat. 5 Geo. 2. c. 30. f. 25.

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by the creditors, the Great (a) Seal may, upon the petition of any (b) creditor, make fuch order (c) therein as shall be just and reafonable."

The commissioners (d) shall cause public notice to be given in the two London Gazettes immediately following the removal of the assignees, and the appointment of others, that the former assignees are removed, and others appointed in their stead, and that the bankrupt's debtors do not pay their debts to the assignees removed.

Lord (e) Hardwicke ordered affignees under a commission, to be removed from being assignees of the bankrupt's estate and essects, by reason of the missehaviour of the commissioners in the said commission, and that the said bankrupt's creditors should proceed to a choice of new assignees in their room, and for that purpose, that after the said com-

(a) Stat. 5 Geo. 2. c. 30. f. 31.

(b) Or on the petition of the affignee himself; but it feems no order can be made on this application, unless an affignment has been actually executed by the commissioners to the affignee. See and consider the preamble to s. 31. of this statute.

(c) In case a new assignment shall be ordered to be made, bankrupt's debts, effects, and estate, shall be thereby effectually and legally vested in the new assignees, who may sue in their (not their own) names, and may discharge actions and give acquittances as former assignees. Stat. 5 Geo. 2. c. 30. s. 31.

(a) Stat. 5 Geo. 2. c. 30. f. 31.

(e) 7 Vin. Abr. 77. pl. 3.

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mission should be renewed, an advertisement should be published in the London Gazette, appointing a meeting of the creditors of the faid bankrupt for the choice of fuch new affignees; and after fuch choice should be made, his lordfhip did order that the furviving commissioners, or any three of them, and the faid affignees fo removed, should join with the major part of the commissioners, to be named in the renewed commission, in making an affignment of the faid bankrupt's estate and effects, to the new assignees, so to be chosen; and did further order, that forthwith, after the execution of fuch affignment, the faid old affignees thould respectively deliver over to the new affignees all the effects of the faid, bankrupt, remaining in specie, in the hands, custody, or power, of them, or any of them, upon oath; and also all books, papers, and writings in their respective hands, custody, or power, relating to the faid bankrupt's estate or effects upon oath; and that the faid old affignees should deliver possession of the said bankrupt's real estate to the new assignees.

Lord Hardwicke (a) upon petition of creditors, ordered an affignee under a commiffion of bankrupt, who became bankrupt himself afterwards, to be removed, from being an affignee under the commission, on

<sup>(</sup>a) Atk. Rep. 97. pl. 43.

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account of his own bankruptcy, and gave the creditors liberty to proceed to a new choice, and further ordered, that not only the affiguee petitioned against, but also his assigness should join with the commissioners in executing an assignment, to the new assignment the assignment the assignment the assignment of the new assignment the assignment of the

soicke faid gave the commissioners an equitable as well as

ever fince. Vel. Rep. 4. A H D

(b) For they are within all the fiatutes of bankrupts of the composition of the fiatutes of bankrupts of the copy hold is to pay almost all the salue of a copy hold is to pay almost all the copy hold is to pay better fine, the venue of a composition of the copy hold is velled in the bargainea before the copy hold is velled in the bargainea before the bank to the copy hold is velled in the bargainea before the bank to the copy hold is velled in the bargainea before the bank to the copy hold is velled in the bargainea before a copy hold bank to the copy hold the copy hold the copy hold the was of opinion, that and figure under a chamber of copinion, that and a copy hold the copy hold the was of opinion, that and a copy hold the copy

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#### the creditors beenty to proceed to a new 1. What real offate the commissioners may fell.

the all are prettiened against, out also his The (a) commissioners have full power by their discretion, to dispose of all the bankrupt's lands, tenements, and bereditaments as well copyhold (b) as freehold, which he had in his own right before he became bank-

(a) Stat. 13 El. c. 7. f. 2. This flatute lord Hardwicks faid gave the commissioners an equitable as well as a legal jurisdiction, and that it had been so confirmed

ever fince. Atk. Rep. 77.

(b) For they are within all the flatutes of bankrupts, 2 Com. Dig. 417. The vendee of a copyhold is to pay the lord bis fine, and be admitted. Stat. 13 El. c. 7. f. 3. And if the lord refuse upon tender of a competent fine, the vendee may enter. Stone 127. Billingb. 148. The copyhold is vested in the bargainee before his admittance, though he cannot enter, or take the profits, and he shall avoid all mesne acts between the profits, and he shall avoid all mesne acts between the sale and admittance. 2 Com. Dig. 417. An assignee under a commission of bankrupt of a copyhold estate is a vendee within 13 Eliz. c. 7. and not the purchaser from the affignee of fuch estate. By lord Hardwicke. Att. Rep. 96. And he was of opinion, that an affignee under a commission of bankrupt, must surrender a copyhold estate to a purchaser, though it is very hard the lord should exact two fines, but no person can make a common law conveyance of a copyhold; it must be by furrender; the commissioners, by stat. 43 El. c. 7. have no interest (2 Show. Rep. 157.) in the bankrupt's lands, but only a power to convey, and at first the commissioners made sale to the creditors, but that was found inconvenient, therefore they made general affigomepts to truffees to distribute the whole. Aik. 

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rupt, or which (a) descended or came to him at any time afterwards, before the debts to the creditors were fully fatisfied or agreed for; and all lands and tenements which were purchased by him (b) jointly with his (c) wife, children or child, to his own use, for fuch interest therein as he might (d) lawfully part with; or purchased with any other

(a) Stat. 13 El. c. 7. f. 11. Cr. Car. 568. pl. 6. Lord Hardwicke faid, that if any future real estate defeended to a bankrupt after the execution of the first bargain and sale, there must be a new one. Aik. Rep. 253. Lands descended to a bankrupt after distribution are subject to a new sale and distribution. Billingh. 118. but Stone 132. is expresly contrary.

(b) If two be feized jointly, and one becomes bank. rupt and dies, his part shall be fold, and there shall be no furvivorship in this case. See the reasons in Stone 126. Billingh. 111. Good. 89. If the bankrupt be jointtenant in fee, for life, or years, the commissioners may

fell a moiety. Com. Dig 530.

(c) If he be feized in right of his wife, they may fell during the coverture. Com. Dig. 530. yet, if a purchase in the name of himself and his wife, and son, was before his trading, the commissioners cannot fell it.

Cro. Car. 550.

ney to feet of ted not (d) See Wil. Rep. 385. in notes. Gibson (late bishop of London) and Dr. Burn both hold, that if a patron be. comes bankrupt, the commissioners may felt the advowson, but if the church be void at the time of the fale, the vendee shall not present to the void turn, but the bankrupt himself, because the turn of a church is not valuable. 2 Gibf. Cod, 794. Burn's Eccl. Law, 98. 4 Bac. Abr. 465. And Billingburft fays, that without doubt, if the commissioners present any one for money, it is fimony. Billingh. 123. See Good: 116.

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They may fell all the lands and tenements which the bankrupt had at the time of his bankruptcy in fee, for life, or for years; all rents, annuities and (b) offices, any fundamental and (c) offices, and (c) of

(a) Stone 133. Billing. 114.

(b) By these are intended offices of inheritance, &c. as warden of the fleet, &c. or a goaler by inheritance, and not offices of truft, for by flat. 5 & 6 Ed. 6. c. 16. (which prohibits the fale of offices of juffice) they cannot be fold; be des, they are indivisibly annexed to the person. Billingb. 122. Stone 126. See o Rep. 48. a. Good. 87. Lord King declared, that the office of ferjeant at mace was not faleable, as it concerned the execution of justice; nor the place of one of the clerks of the fix clerk's office. Atk. Rep. 212. But the office of under marshall of the city of London, as it does not concern the administration of justice, is not within stat. 5 & 6 Ed. 6. c. 16. and may therefore be fold. By lord Hardwicke; Ark. Rep. 210. pl. 117. And he faid, that notwithstanding Stone and Billing burft in their readings on these acts (34 and 35 H. 8. c. 4. and 13 El. c. 7.) fay, that only offices of inheritance are within the meaning of them; yet he was of opinion, that their confiruction was contrary to the express words of the acts, for that terms of years (in stat. Hen. 8.) related directly to offices, not in lands only, but all other offices. Aik. Rep. 213. It is observable, that Stone's reading is professedly on stat. 13 El. c. 7. and on that flatute enly; that Billingburft but just mentions flat. H. 8. and that lord Hardwicke himself on another occasion declared, that "the statute of Henry the 8th had been fo much altered by subsequent acts, that it did not deferve any confideration." Atk. Rep. 77. 2 Wil. Rep. 429. S. P. Quere therefore the above didum of lord Hardwicke, concerning Stone and Billingburft.

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ture (a) interest, as, a term to commence in future; land (b) devised to him; his wife's (c) estate vested in trustees before marriage for her separate use; all lands, (d) tenements, hereditaments, annuities, offices, and fees, conveyed, or cause to have been conveyed by him, to any of his children, or other (e) person, or into any other men's names, as amply as if the bankrupt, at the time of his bankruptcy, had been actually seized in his own name of the like interest; and also lands whereof he shall be reputed (f) owner, and with the consent of the true owner, shall take upon him the fale and disposition, though formerly conveyed by him to such true owner for valuable confideration, and all

(b) Stone 125. Good. 88.

(d) Stat. 1 Jac. c. 15. f. 5.

( ) Stat. 21 Jac. c. 19. f. 11.

<sup>(</sup>a) Com. Dig. 530. Id person word profes

<sup>(</sup>c) 10 Mod. 247. Wil. Rep. 248. but Wil. Rep. 458.

<sup>(</sup>e) So, if they are conveyed before his bankruptcy, in confideration of marriage, to the use of himself, and his wife, though the wife is not named by the statute, for she is within the intent. Style 289. B. in 1718, after marriage, conveyed his real estate to trustees in consideration of 5 s. and other valuable considerations, in trust for himself for life, to his wife for life, then to his eldest son, if he survived his father and mother, and so to his second son, &c. B. afterwards became banktupt; lord Hardwicke said, that this conveyance fell directly within this clause of the statute. Atk. Rep. 93. pl. 41. See Bur. Rep. 472.

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lands extended (a) after his becoming bankrnpt, on pretence of his being accomptant, or indebted to the king, if upon examination of the commissioners on oath, it be found, fuch debt be due to fuch accomptant or debtor, "on a contract not originally made between him and the bankrupt, but made with or in trust for some other person; they may fell a (b) possibility of right belonging to the bankrupt; and any (c) of his lands or tenements, wherein he shall be seized of an estate (d) tail, in possession (e), remainder, or (f) reversion, unless the remainder or reversion shall be in the crown, of the gift of the crown, and fuch fale shall be good against all such issues in tail, remainder-men, and reversioners, whom the bankrupt himfelf might have barred by common recovery or other means. They (g) may fell an eftate,

(a) Stat. 21 Jac. c. 19. f. 10.

(b) Wil. Rep. 385. 3 Wil. Rep. 132. pl. 30. Good. 83, 84. the bankrupt is to deliver all the estate he is interested in, or whereby he hath or may expect any profit, possibility of profit, &c. Stat. 5 Geo. 2. c. 30.

(t) Stat. 21 Jac. c. 19. f. 12. Stone 125, 126.

(d) They may fell a copyhold intailed, which by cullom may be intailed and cut off, otherwise, if there be no such custom. Stone 127. Billingb. 148.

(e) Lord Hardwicke observed, that this was but a

flight advantage to creditors. Atk. Rep. 79.

(f) Stene 128. 99 9 . 128

(g) Stat. 21 Jac. c. 19. f. 13. Sone 125. See Stone

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which the bankrupt has, to commence upon a contingency; and all equities of (b) redemption upon mortgaged estates shall be at the disposal of the commissioners; for they shall have power to redeem the same, as the bankrupt himself might have done, and after redemption to sell them.

A merchant makes a foeffment in fee upon condition, upon payment of money to re-enter, he becomes bankrupt, the commisfioners may tender the money at the day,

and fell the land.

# 2. What real estates the commissioners cannot fell.

The commissioners cannot (c) sell lands, &c. assured by the bankrupt before he became bankrupt, so as such assurance was made bona side, and the party to whose use made, was not privy or consenting to the purpose of the bankrupt, to deceive his creditors, at or before such assurance; nor (d)

12. Billingb. 116. & Good. 88. 2 Vern. 97. whether the commissioners may, by the equity of the statute, appoint one to enter for a condition broken.

(a) Stone 125. Billingb. 148, 149. Good. 89. See Nelf. Ch. Rep. 102. Ch. Caf. 17. 2 Vern. 97, 286.

pl. 274.

(d) W. 7. 203.

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<sup>(</sup>b) Stone 125. Billingh. 148, 149. Go od. 89. (c) Stat. 13 El. c. 7. f. 12. Mo. 594. pl. 805. March: 34. pl. 67. Billingh. 113.

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lands which the bankrupt had fold by deed indented, though the inrolment was after the bankruptcy; nor lands, whereof an extent (a) was ferved, before the party became bankrupt; nor lands purchased or conveyed by the bankrupt upon the marriage (b) of any of his children, both parties being of years of confent; fo, if land be fettled in trust for the wife of B. by the ancestor of fuch wife, and B. becomes bankrupt, the assignee shall have no (c) benefit of such trust, during the joint lives of B. and his wife; fo, if the father of B. covenant upon his marriage to pay 15 l. a year to B. during the life of the father, and B. becomes bankrupt, the assignees shall not (d) have the benefit of such agreement; neither can they fell the (e) barony of a peer; nor lands (f) devised to the bankrupt's wife; nor her dower (g), nor a fettlement (b) made by a

<sup>(</sup>a) Stat. 21 Jac. c. 19. f. 9. 2 Black. Com. 487. Nor lands whereon a flatute has been extended, though the liberate was not fued before his bankruptcy. Cro. Car. 149. W. Jo. 203.

<sup>(</sup>b) Stat. 1 Jac. c. 15. f. 5.

<sup>(</sup>c) 2 Vern. 96. pl. 89.

<sup>(</sup>d) 2 Vern. 194. pl. 176.

<sup>(</sup>e) Stone 125.

<sup>(</sup>f) Eq. Caf. Abr. 54. pl. 6. 7 Vin. Abr. 95. pl. 43. 2 Vern. 96. pl. 89. 2 Wil. Rep. 316. pl. 91. 319.

<sup>(</sup>g) 9 Vin. Abr. 227. pl. 60. unless the marry a bankrupt. Read Stat. Law, 187.

<sup>(</sup>b) 3 Wil. Rep. 298. pl. 75.

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bankrupt, when he was not a trader; nor the interest of a joint (a) trader, for it is not bound by the bankruptcy of his com-

panion.

No (b) purchaser for valuable consideration shall be impeached, unless the commission was sued out within five years after he became bankrupt; so, if the bankrupt be afterwards outlawed, and A. gives money for a lease of his land from the king, before the commission sued, he will be a purchaser (c) bond side for so much.

### 3. In what manner the fale shall be.

The commissioners shall cause all the bankrupt's lands, tenements, hereditaments, sees, annuities, and offices to be (d) searched, viewed (e), and appraised to their full value, and sell the same by deed (f) indented and (g) inrolled, in one of her majesty's courts of record,

(a) Salk. 61. Mod. Rep. 45. pl. 100. 12 Mod. 446. Lit Abr. 287.

(b) Stat. 21 Jac. c. 19. f. 14. Keb. Rep. 722. pl. 54. (c) Salk. 109. but quire, and fee Com. Dig. 532.

(d) Stat. 13 El. c. 7. f. 2.

(e) And though there be no view of the lands by the commissioners before the sale, it will be good. Com. Dig. 534.

(f) Stat. 13 El. c. 7. f. 2. 21 Jac. c. 19. f. 12. (g) Stat. 13 El. c. 7. f. 2. 21 Jac. c. 19. f. 12. Carth. 178. 2 Show. Rep. 156. Ventr. 360. Skin. 30. pl. 6. T. Jo. 196, 197. 12 Mod. 3. Lord Coke says, the deed 5.

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record, or (a) divide the lands, &c. proportionably among the creditors. vd bound too

Lord (b) Hardwicke was of opinion, that commissioners of bankruptcy ought not to be fo extremely nice, as to preclude a perfon from being a purchaser, because he happened to have out-stayed the time fet by the commissioners, and compared it to the case of estates sold before masters for payment of creditors, and that the advertisements in cases of sales before commissioners of bankrupts should not be general for a meeting in order to fell a bankrupt's estate. but should name the hour as masters (c) do. and that after the time expired, if the commissioners were not gone, that they ought to admit a better bidder, in order to give the creditors as great a satisfaction for their loss as possible.

## II. As to the bankrupt personal Estate.

This feems reducible likewife to the fame fubdivisions to which we reduced our con-

deed need not to be inrolled, because the act fays, by deed indented and inrolled, or otherwise. 2 Rep. 26. a.

(a) Stat. 13 El. c. 7. f. 2. (b) Atk. Rep. 202, 203.

(c) Who always advertise the estate to be fold at a definite time, as between the hours of ten and twelve, that they may not be under the necessity of staying beyond that time; but if a person comes to bid, even after that time, before the mafter is gone, he is admitted notwithstanding. Atk. Rep. 202, 203.

fiderations on the bankrupt's real estate, viz.

1. What the commissioners may fell.

2. What they cannot: and

3. In what manner the fale shall be.

## 1. What personal estate the commissioners may sell.

The commissioners may (a) fell all (b) money, goods, chattels, merchandizes, wares, and (c) debts of a bankrupt wherever found; they are empowered to assign or dispose all the (d) debts due to and for the benefit of the

(a) Stat. 13 El. c. 7. f. 2. goods, &c. which come to the bankrupt after distribution, are subject to a new sale and distribution, according to Billingh. 118. but Stone 132. expressly says they are not.

(6) Though the bankrupt pay his money to any creditor for a just debt. 2 Rep. 25. b. 26. a. contra by stat. 1 Jac. c. 15. s. 14. See fol. 94. They may sell monies due to a bankrupt upon a judgment. W. J. 215. pl. 4.

(c) Though transerred into other men's names, in as ample manner as if the bankrupt had been actually possessed thereof, except the same was transferred upon the marriage of his children, (both the parties married being of years of consent) or some other valuable consideration. Stat. 1 Jac. c. 15. f. 5. And also debt due to the bankrupt's wife, though unrecovered. Will Rep. 249 10 Mod. 160, 243. Gilb. Cas. 318.

(d) Lord Hardwicke was of opinion, that the debts here mentioned meant debts due at the time of the

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the bankrupt, to the use of the creditors, and the same disposition of the debts shall vest the property in the person to whom assigned by the commissioners, as sully as if the bond, judgment, or contract, whereupon the debt shall arise, had been made to the person to whom the same shall be so assigned, so that the bankrupt shall not afterwards recover, release, or discharge the same, nor shall it be attached as a debt of the (a) bankrupt; they may assign an (b) obligation taken in another's name to the bankrupt's use.

The commissioners may sell all the (c) goods of the bankrupt, though he sold them bond fide after his bankruptcy, and before the commission awarded; so, if he made a (d) gift to a creditor of them; or had sold (e)

bankruptcy, or when the commission issued, which was the same, for it was then only, that the creditors were to have a portion rate like. Atk. Rep. 78.

(a) Stat. I Jac. c. 15. f. 13. The preamble observes, "that the power and authority given to commissioners touching debts due to bankrupts was not so full-and perfect, as that the full benefit thereof, in due course, could be employed to the use of the creditors as intended."

(b) Noy's Rep. 142. Palm. 505.

(c) Com. Dig. 531.

(d) Com. Dig. 525.
(e) For the fale is avoided by relation. 2 Keb.
Rep. 33.

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them toms market (a) ovent ; la (b) fortiori, goods, foldwby the bankrups dafter the commiffion, before feizure; takey may fell his goods in (t) Irelanda his goods (d) forfeited, and strized by (a) capies uslegatum after the bankruptcy, and before the commission, for a banktupt shall not defeat his creditors, by his act, on (2) default; for the goods of a bankrupt (f) felon shall go among the creditors ; they may fell an heriot (g) relief, &c. due to the banksupt; ba legacy (b) given himsefor which be had a decree wo for they may his there of wthe partnership flock in tradeli(i) montgaged to a partner; his pay (k) as an officer in the army of the execution

(a) By Twisden. Lev. Rep. 174. Sid. 272. 2 Keb: Rep. 33: datute, with respect to legos increases of with respect to legos in 1918, of with respect to legos in 1918, of with the colored colored as to the respect to the r

(1) Billingh. 123. Good. 114. Com. Dig. 531.

(d) Salk. 109.

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(e) L. Ch. Baron Comyns fays, that it was refolved otherwise in the Exchequer. Hil. 6 Geo. Com. Dig. 532.

(g) Com. Dig. 532. 6 (4) 2 Vernu 432 433, or which was left him after his certificate figned by number and value of his creditors, and the commissioners; before it was confirmed and allowed

by the Great Seal. 2 Bur. Rep. 719.

(i) Tri. at Ni. Pri. 40. Aik. Rep. 156. Unless it was delivered at the time of the mortgage, because otherwise it is a delusive credit, and falls within stat. 21 Jac. 3 Keb. Rep. 480. pl. 17. 382. 988 . 41. 100100 tion executed cannot be defeated by a 92 matth of bankrupter 2 Moc. 236. Comb. 121. Show Rep.

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They may fell all (a) goods whereof the bankrupt shall be reputed (b) owner, and with the confent of the true owner, shall take upon him the fale and disposition, though formerly conveyed (c) by the bankrupt to fuch true owner for valuable confideration; and all goods extended (d) after his becoming bankrupt, on pretence of his being accomptant, or indebted to the king, if upon examination of the commissioners on oath it be found, fuch debt be due to fuch accomptant, or debtor on a contract not originally made between him and the bankrupt, but made with or in trust for fome other person; so, goods taken in (e) execution

(a) Lord Hardwicke said, that the provisions in s. 12. of this statute, with respect to legal interests, must be followed as to equitable ones; that choses in action therefore were within the meaning of the act, and included in the words goods, &c. Att. Rep. 184.

(b) State 21 Jac. c. 19. f. 11. Counsel faid, that continuing in possession was always looked upon as evidence of fraud, that this law was only declarative of

what was the law before. Bur. Rep. 474.

(c) Lord Hardwicke faid, that this statute extended to conditional as well as absolute sales. Ack. Rep. 183.

(d) Stat. 21 Jac. c. 19. f. 10.

(e) As it feemeth, Lev. 173. refolved. Bur. Rep. 34.

37. Lord Raym. 715. Bur. Rep. 36. Frem. 397.
pl 516. Keb. Rep. 930 pl. 36. 2 Keb. Rep. 34.

3 Keb. Rep. 480. pl. 17. 3 Lev. Rep. 69, 191. Execution executed cannot be defeated by a committee of bankruptcy. 3 Mod. 236. Cemb. 121. Show Rep.

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Chap. 5.

execution after an act of bankruptcy, though the writ bears teste before; so a judgment (a) obtained by a creditor after an act of banktuptcy shall be avoided; so if the bankrupt had granted or pledged his goods for payment of the money, the commissioners may pay or tender the money, and then (b) fell the goods.

#### 2. What personal estate the commissioner's cannot Jell.

The commissioners cannot (c) fell (d) flock which the bankrupt had as truftee only, for payment of the debts of another; nor (e) goods originally the plaintiff's, and

146. 2 Ventr. 169, 170. but this not law. Yet if the goods of a bankrupt are feized in execution after the bankruptcy, and fold by the fheriff, the commissioners cannot affign the money raised by the sale, but they must affign the goods themselves, 3 Lev. Rep. 192. So if the goods are taken in execution by the sheriff at the suit of the bankrupt, they cannot be affigned till they come to the hands of the bankrupt. W. Jo. 215. mages which the bankrupt may recover for trespass or stander, before they are ascertained by judgment. W. Jo. 215. pl. 4. Cro. Car. 166, 167.

(a) Com. Dig. 532. 12 Mod. 446.

(b) Stat. 21 Jac. c. 19. f. 13.

(c) Com. Dig. 533. Wil. Rep. 314. pl. 81. id. 321. (d) Lord Parker faid, that it would lessen the credit of the nation to make trust stock liable to bankruptcy, 3 Wil. Rep. 187. Note (A).

(e) Wil. Rep. 318.

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Chap which bare, ule; as (b deliv rupte good cute good rupt, an er rupt writ does ficer rene

> longi to fal at Ni (6) Gilb. fol. 2

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which the bankrupt had no more than a bare authority to (a) fell for the plaintiff's ule; nor effects which the bankrupt had as (b) executor, or (c) factor; nor goods delivered (d) antecedent to an act of bankruptcy, though accepted subsequent; nor goods whereof an execution was (e) executed, before he became bankrupt; nor goods taken (f) in execution for the bankrupt, before the return of the writ; fo, if an execution be made after an act of bankruptcy, and before (g) notice of it, upon a writ tested before the bankruptcy, Trover does not lie by the affignees against the officer; if a leffee for years has a covenant for renewal, the affignee shall have no (b) benefit of it; nor of a:(i) legacy left the bank-

(a) But if a jeweller have in his possession jewels belonging to A. and becoming bankrupt, offer the jewels to sale to J. S. the assignee may dispose of them. Tri. at Ni. Pri. 40.

(b) Comb. 185. Show. Rep. 294. 10 Mod. 161, 245. Gilb. Cal. 323, 11 Mod. 139. Wil. Rep. 256, 319. See

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(c) Wil. Rep. 319. 7 Vin. Abr. 89. pl. 5. in notes. 3 Wil. Rep. 185. pl. 44.

(d) 10 Mod. 432: Stra. 165. Fortef. Rep. 35 .-

(e) Stat. 21 Jac. c. 19. f. 9. 2 Black. Com. 487.

(f) Gro. Car. 166: pl. 12. 176. pl. 24. W. Jo. 215.

pl. 4. Yet goods not taken in execution may be fold, though the writ of execution was delivered to the fac
riff before his bankruptcy. 3 Lev. Rep. 70, 192.

(g) Lew, Rep. 173. Sid. 271. pl. 27.

(b) 2 Vern. 97. Ch. Caf. 17, 18.

(i) Ch. Pr. 121.

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They cannot fell goods purchased or conveyed by the bankrupt upon the (b) marriage of any of his children, both parties being of years of confent afthey cannot affign debts (c) paid by a debtor to the bankrupt, truly and bana fide, s before he understood him to be bankrupt; nor debts due to him asi(d) executor, but it is for this particular reason, because they are appropriated to pay the testator's debts ; and if they were affigned; it would be a wrong, viz, a devastavit; nor goods (e) bought of a bankrupt bona fide for valuable confideration, before notice of the bankruptcy; nor goods delivered by a bankrupt pursuant to an (f) award confirmed in Chancery without fraud, before notice that he was bankrupt; nor goods configned (g) to the bankrupt but not paid for, notice that he was in infolvent circumftance

(a) 2 Vern. 662. pl. 587. 2 Wil. Rep. 298. otherwife of such a contingent bond. 2 Wil. Rep. 497.

(b) Nor debts in such case, or for some other valuable consideration transferred into other men's names. Stat. 1 Jac. c. 15. s. 5.

(c) Stat. Jac. c. 15. f. 14. 3 Keb. Rep. 190. pl. 38.

fee fol. 95. Note (r).

(a) Was Rep. 254. 10 Mod. 162, 163, 245. Gilb.

(e) So it feemeth. Skin. 149. pl. 21. A. A. 8

(f) Quere 2 Vern. 230. OL . A. A. M. se in I (

(g) Contra at law, but so resolved in equity 2 Kern. 203. pl. 187. Atk. Rep. 248, 249.

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which the cowner before tdelivery hearing that he was bankcupt, and changing his former confignment, configns to another; nor a bond, &c. affigned (a) by the bankrupt for a just debt, before his bankruptcy; fo they cannot affign money given by the bankrupt after (b) an act of bankruptcy committed, to put his fon apprentice, being the usual rate, and given several years before he appeared to be bankrupt; nor (e) money recovered against a bankrupt, before notice; nor a chofe in action (ex. gr. a ship at fea) mortgaged or fold by the bankrupt, the muniments being delivered over (d); nor the interest of a joint (e) trader, for it is not bound by the bankruptcy of his companion; nor money which before the fuing forth of the commission, was bona fide, and in the usual course of trade (f) received of the bankrupt, before the person receiving had notice that he was in infolvent circumstances; nor debts or goods affigned by him, before he became bankrupt, to his fecurity on his being appointed receiver of the court of (g) chancery. 12 1 13 C. C. F C. L. S (c) Stat. | ac. c. 17

(a) 2 Vern. 428. pl. 390.

(c) 3 Keb. Rep. 231, 232.

(d) Tri. at Ni. Pri. 40. Ath. Rep. 171.

(f) Stat. 19 Geo. 2. C. 32. f. 19 ...

(g) Bur. Rep. 472.

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3. In:

<sup>(</sup>b) Reselved in 3 Lev. Rep. 58, 59. doubted in Shin. 21. pl. 21.

<sup>(</sup>e) 4 Salk. 61. Mod. Rep. 45. pl. 100. 12 Mod. 446.

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3. In what manner the fale Shall be.

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The (a) assignment may be made to the creditors who come in, of all the goods of the bankrupt, for satisfaction of their respective debts rateably; or to any in trust, and for the equal benefit of all the creditors; and if all the creditors have a joint debt, the goods may be assigned to them (b) generally.

The commissioners shall cause the bankrupt's goods, &c. to be (e) searched, (d) viewed, and appraised to the best value; or otherwise to order the same for satisfaction, and payment of creditors; and they shall grant and assign, or otherwise dispose all (e)

debts due to the bankrupt.

The commissioners shall assign the bank-

(a) Com. Dig. 535.

(b) But a general affigument of the goods to the creditors, who have several and different debts, is not good. 2 Rep. 26. b.

(c) Stat. 13 El. c. 7. f. 2.

(d) Though there be no view of the goods by the commissioners before the sale, it will be good. 2 Rep. 26. a.

good, though the debt affigned is more than was due. T. Raym. Z.

rupt's

rupt's estate and effects unto the (a) affig-

nees (b) chofen by the (c) creditors.

Lord chancellor (d) Hardwicke recommended it to the commissioners of bankrupt, to except copyholds out of the deed of affignment of the bankrupt's estate, because it would fave the expence of two fines; for the commissioners, where the creditors could meet with a purchaser of the copyhold, might convey to him in the first instance.

Commissioners of bankrupts having made an affignment of the bankrupt's estate, and the bankrupt afterwards obtains his certificate, cannot (e) make a subsequent affign-

(a) The affiguees shall keep distinct books of accompt, wherein they shall duly enter all money or other effects which they shall have got in or received out of the bankrupt's estate, to which book every creditor shall, at all reasonable times, have free refort, and inspect the same as often as they shall think fit. Stat. 5 Geo. 2. c. 30, f. 26.

(b) Stat. 5 Geo. 2. c. 30. f. 26. lord Hardwicke faid, that when affignees were chosen under a first commission, all the estate and effects of the bankrupt were vested in them, and he was incapable of carrying on any trade, and all his future personal estate was affected by the affignment, and every new acquisition would west in

affignees. Ack. Rep. 253. choice of affignees, whose debt shall not amount to tea pounds. Stat. 5 Geo. z. c. 30. f. 27.

(d) Atk. Rep. 96.

(e) Eq. Caf. Abr. 54. pl. 7. 2 Eq. Caf. Abr. 124.

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(Lord (a) Handwicke thought in very proper that the words bes jointly and feverally? fhoold be inferred in the affigument, for the fafery and fecurity of each respective afs may tend to difclose his efface, or sesngil

No (b) schedule shall be annexed to any deed of affignment of the personal estate of a bankrupt from the commissioners to the hey may alfo examine in manner atasongina

very person duly summoned before, or pre-

ent at any of their meetings, touching all

matters relating to the person, trade, deal-

. nes, estate, and esfects of the bankrupt,and any act cl Vank Puch Comitted by-

um, and (d) also reduce into writing the an-The examination and commitment of the bankrupt, and of his wife, and others which examination lo reduceros vitting, the party examined shall tign an

HE commissioners (c) may (d) examine as well by word of mouth as on interrogatories in writing every (e) bank-

pl. 2. 7 Vin. Abr. 88. pl. 12. Wil. Rep. 385, 386. Gilb. Eq. Rep. 141. 2000 and All Advisoral Dec

eo. c. 24. [expired

(a) Aik. Rep. 90. (b) Stat. 5 Geo. 2: c. 30. f. 42.

(c) Stat. 5 Geo. 2. c. 30. f. 16. time of issuing the commission, and is willing to submit to be examined, but cannot be brought before the commissioners, they shall attend the bankrupt in custody, and take his diseovery. Stat. 5 Geo. 2. c. 30. f. 6.

(e) Though the examination of the commissioners rupt Cha rupt trad g00 boo as n gran land as t they evel fent mat ings and fwe rup the

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wri fub rupt touching all matters relating to his (a) trade, dealing (b), lands (c), tenements. goods, chattels, effects, debts, bills, bonds, books of accompt, and fuch other things as may tend to disclose his estate, or secret grants, conveyances, and eloining of his lands, tenements, goods, money, and debts, as the commissioners shall think meet; and they may also examine in manner aforesaid every person duly summoned before, or prefent at any of their meetings, touching all matters relating to the person, trade, dealings, estate, and effects of the bankrupt, and any act of bankruptcy committed by him, and (d) also reduce into writing the anfwers of verbal examinations of the bankrupt or other person, had or taken before them; which examination fo reduced into writing, the party examined shall sign and fubscribe.

may subject the bankrupt to penalties, as in the case of a bankrupt smuggler, yet notwithstanding the commissioners may undoubtedly examine him, as to his estate and effects, what he has, where it lies, &c. By lord Hardwicke. Atk. Rep. 200.

(a) Lord chancellor Parker faid, that till Seat. 5 Geo. c. 24. [expired] the commissioners could not examine the bankrupt himself touching his bankruptcy.

Wil. Rep. 611.

(b) Stat. 5 Geo. 2. c. 30. f. 16.

(c) Stat. 1 Jac. c. 15. f. 7.

(d) Stat. 5 Geo. 2. c. 30. f. 16.

If (a) any person, being known or sufpected to have any part of the bankrupt's lands, tenements, hereditaments, goods, chattels or debts, or to be indebted to or for his benefit, shall (after lawful warning to the faid person given, to come before the faid commissioners to be examined, according to the intent of 13 Eliz. c. 7.6.5.) refuse to come, or shall not come before the commissioners at the time appointed, having no lawful impediment (fuch as shall be admitted and allowed of by the commissioners, and which shall be then fignified, or made known to them at the time of their affembly) or that any fuch person, having knowledge or warning of any other meeting of the commissioners, shall not come and appear before them at fuch time as he lawfully may come, having no fuch lawful impediment, as shall be then made known to them, and by them admitted and allowed of as aforefaid, or being come before them, shall refuse to be fworn, and to make answer to such interrogatories as shall be ministered unto him, according to stat. 13 Eliz. c. 7. they may commit to fuch ward and prison, as to them shall be thought meet, such person as shall fo refuse to be sworn, and make answer to fuch interrogatories to be ministered as aforefaid, and direct their warrants to fuch per-

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Previous to this flatute, a bin crupt as disch-(a) Stat. Jac. c. 15. f. 10. 1'gnil do truop ent and commitment of the commiffeners, be a fe ther

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fons as to them shall be thought meet, to apprehend fuch person as shall refuse to appear before them as aforefaid, and to bring him before them to be examined as abovefaid, and upon his refusal to come before them as aforefaid, they may commit the parties so refusing, to such prison as they shall think meet, there to remain without bail or mainprize, until fuch time as the person so refusing to come, or to be sworn to answer before the commissioners; do (a) submit himself to them (b), and be by them examined according to 13 Eliz. c. 7. and 1 Jac. (c) C. 15.

If any (d) bankrupt or other person shall refuse to answer, or shall not fully answer to the fatisfaction of the commissioners, all lawful questions put to him by the commissioners, as well by word of (e) mouth, as on and allowed of as afort

(a) By Holt, ch just. fubmit in this statute does not mean an act of humble submission, but only to make answer to the question proposed. Lord Raym, 100.

(b) The word and in this act 1. ch. just. Hok faid, meant id eff, and tied the submission to that particular

purpose. Lord Raym. 100.

m. Thall refute

(c) Mr. Just. Foster faid, that the powers under this flatute continued still in force, notwithstanding the fubsequent statutes. 2 Bur. Rep. 1124.

(d) Stat. 5 Geo. 2. c. 30. f. 16.

(e) Previous to this statute, a bankrupt was discharged by the court of King's Binch on his Habeas Corpas, from a commitment of the commissioners, because they had not exhibited interrogatories (which are a term

(a) interrogatories in writing, or shall refuse to fign and fubicribe his examination fo reduced into writing, (not having a reasonable (b) objection, either to the wording thereof or otherwise, to be allowed by the said commissioners); they may by warrant under their hands and feals commit him to fuch (c) prison as they shall think fit, there to remain without bail or mainprize, until fuch

known in the law, and import that the questions were put into writing. 2 Stra. 880.) to him, and examined him thereon; and Holt held a bankrupt ought to have a copy of them, and time to consider of his answer. 2 Stra. 880. Barnard. K. B. 398. Sel. Cal. 333, 334-Lil. Abr. 286, 287. Lord Hardwicke refused a person fummoned by the commissioners in order to be examined touching his trade and dealings with the bankrupt, a copy of the interrogatories or time to prepare himself for his examination. Atk. Rep. 205 pl. 108. Lord Holt's reason that the interrogatories should be reduced into writing was, because then it would appear, whether the questions were proper, and if one of them was improper, he faid the prisoner should be discharged. Barnard. K. B. 339.

(a) Stat. I Jac. c. 15. f. 8.

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(b) Lord Hardwicke faid, if the bankrupt had an objection to the question, he must demur to the interrogatories, and the court of Chancery would judge of the

question upon petition. Atk. Rep. 208.

(c) Bankrupt or other person committed by the commissioners suffered to escape or go out of prison, until duly discharged, gaoler to forfeit 500 1. and 100%. more if he refuses to thew such prisoner to a creditor who produces a certificate from the commissioners (which they are to deliver gratis) of his having proved his debt under the commission. See flat. c Geo. s. c. 30. 6. 18, 19. time

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rime as he shall (a) submit himself to the commissioners, and full answer make to their fatisfaction, to all fuch questions as shall be put to him, (which questions (b) must be (c) specified in the warrant of commitment), and (d) until he shall fign and subscribe his examination.

That a bankrupt notoriously prevaricated feems not a fufficient cause of commitment, for every prevarication is not; and it is not faid he prevaricated upon his examination, relating to the discovery of his effects, but only that he prevaricated upon his examination, which might be in a matter the commissioners had no power to inquire into. Lord Raymond said, a man might prevaricate on his first examination for half an hour, yet in the conclusion he might make a full and ample answer, and therefore it was not at all proper to fend a man to prison for fuch a piece of conduct; and that nothing

<sup>(</sup>a) Lord Ch. Juft. Wilmot faid, the submission alors was not enough, he must submit to be examined from time to time. 2 Bur. Rep. 1125.

<sup>(</sup>b) Stat. 5 Geo. 2. C. 30. f. 17.

<sup>(</sup>c) Lord Hardwicke faid, that if the bankrupt refuled to answer any question, and the commissioners committed him, and the delinquent brought an Habeas Corpus, the question must be fet forth particularly, that the judges, might judge whether it was a lawful question er note Att. Rep. 200.

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was more common than fuch behaviour on

trials at nisi (a) prius.

Upon the return of the babeas corpus being read, it appeared, that the prisoner was committed by commissioners of bankrupt, for not answering to their satisfaction; the question and answer specified in the warrant were, "Whether the prisoner bought the filk himself, or by a broker?" His anfwer was, " He could not recollect; but be should rather believe by a broker." The court of Common Pleas, after hearing many very long and learned arguments in support and vindication of the commitment, difcharged the prisoner, being unanimously of opinion, that the answer ought to have satisfied the commissioners; because no man is to be pressed further in his testimony, than to oblige him to give his evidence in such a manner as to subject him to perjury if he should swear false; that object they considered as obtained in the present instance, and therefore urging a witness to the alternative of deposing more than he knew, or inflicting on him, in case of refusal, perpepetual imprisonment, would be, the court observed, as bad, if not worse than a Spanish inquisition. East. Term, 13 Geo. 3. 1773. C. B. Millar's Cafe. MSS.

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<sup>(</sup>a) Sef. Caf. 335. 2 Stra. 880. Barnard, K. B. 399.

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Perrott being brought up from Newgate, by Habeas Corpus, appeared upon the return to have been committed by commissioners of bankruptcy to be fafely kept and detained without bail or mainprize, until fuch time as he should submit himself to the commismissioners, and full answer make to their satisfaction to the question put by them to him; which question was specified in their warrant to have been put to him by them in writing, upon the last day of his examination, after his having obtained forty-fix days beyond the ordinary time; and to have been propounded to him in these words, viz. " As you do admit that you have spent the last week, previous to this your examination with Mr. Maynard (one of your affignees) to fettle and adjust your accompts, and to draw up a true state thereof, to enable you to clase such your examination; and do likewife admit, that upon fuch state thereof, it appears that after giving you credit for all fums of money paid by you, and making you debtor for all goods fold and delivered to you, from your first entering into trade to the time of your bankruptcy, it appears that there is a deficiency of 13513 l. give a true and particular accompt what is become of the fame, and how and in what manner you have applied and disposed thereof." To which question so put by the commissioners as aforesaid, the said John Perrott did wilful-

ly and obstinately refuse to give any other than the following general answer; (that is to fay) " That on goods fold this last year, I have loft upwards of 2000 l. and by mournings I have loft upwards of 1000 %. And that for nine or ten years I have (and I am forry to fay it) been extremely extravagant. and spent large sums of money. John Perrott." Which answer of the said John Perrott not being satisfactory to us the said commisfioners .- These are therefore to will, require, and authorize you immediately, upon receit hereof, to arrest, &c. and him safely to convey, &c. and to deliver, &c. fafely to keep and detain, without bail or mainprize, until fuch time as he shall submit himself to us the faid commissioners, or to the major part of the faid commissioners by the faid commission named and authorized, and full answer make to our or their satisfaction, to the question so put to him by us as aforefaid.

Two reasons were urged on the part of Perrot, why he ought to be discharged from this imprisonment. 1st. That the answer which he had already given was a full, sufficient, and satisfactory answer, and the best and only one that could be given by an idle, extravagant man, who had never kept any accompts; and consequently, that the imprisoning him until he should give a more full and

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an imprisonment for life.

The fecond reason was, that the power and jurisdiction of the commissioners, to take the bankrupt's examination and disclosure, was temporary and limited, and confined to the time allowed to the bankrupt to come in and furrender himself and submit to be examined; after which limited time the commissioners had no power to examine him at all: consequently they had no jurisdiction to commit him for any longer time than their own power to examine him lafted; which did not exceed the time allowed him to come in and furrender himself and submit to be examined. And his counsel compared it to a commitment by the house of commons; which ended with their fession.

In support of these objections, they relied upon the construction of the bankrupt act; and particularly of 5 Geo. 2. c. 30.

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On the other fide it was infifted-1. That the bankrupt's answer was nugatory and infufficient; and 2dly, That the power and jurisdiction of the commissioners to examine the bankrupt, and obtain a disclosure and discovery of his estate and effects, and the manner in which he had disposed of them, was not limited and confined to the last minute allowed him for his furrender and fubmission; but might be pursued and proceeded

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upon at any subsequent time; and for this they relied on the end and intention, and genuine construction of all the bankrupt acts, and particularly of I Jac. c. 15. f. 7, 8. and 5 Geo. 2. c. 30. f. 16.

Lord (a) Mansfield. If the question put was improper, or if the question be proper, and the answer satisfactory, the man ought to be discharged; but this is a proper question, and the answer is very insufficient and

unsatisfactory.

fatisfactory. The construction offered by the counsel who object to this commitment is founded upon mere arbitrary implication: the legiflature fay no fuch thing. On the contrary, the 5 Geo. 2. c. 30. f. 16. gives power to the commissioners to commit the bankrupt until he shall submit himself, and full answer make to their satisfaction: and section 17th gives power to the court or judge, to re-commit him to the same prison, there to remain as aforesaid, until he shall conform as aforesaid.

The examination is not confined to be within the time limited for the bankrupt to come in and furrender, and fubmit to be examined. The bankrupt must indeed surrender within the limited time; and he must submit within the limited time, to be examined from time to time; and he must, upon his examination, disclose and discover and de-

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<sup>(</sup>a) 2 Bur. Rep. 1123.

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liver up his estate and essets; but the act does not require the examination to be soll and persect and (a) completed within the limited time; nor is it proper that it should be so. A man's memory may fail him at one time, and be refreshed at another; or his sirst answer may be equivocal, or impersect: and why should he not be called upon to explain and complete it? The power of the commissioners is general, and not limited to the compass of time given to the bankrupt to come in.

The last examination within the limited time is material indeed to the bankrupt himself, (because he cannot afterwards contradict it himself): but he may be compelled by the commissioners to make further answer, after that time. The bankrupt may omit to come in, till the very last minute of his time; and if he then surrenders and submits to be examined, this will save his felony: but it may be absolutely impossible for him to make a full discovery and discourse of his estate and essects, or to give full answers to proper questions within this space of time.

But here, the commissioners have, within the limited time, required a further answer to their question, and committed him for refusing to give it. This commitment

<sup>(</sup>a) See Stat. 5 Geo. 2. c. 30. f. 1.

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was legal, at the time when it was made: and I am clearly satisfied, that he cannot redeem himself from his imprisonment, but on giving a full answer to the question. If he should give a full answer, and the commissioners not be satisfied with it, he will then be entitled to this proper remedy.

The objection has been strongly argued: but there is no cafe to support it. It is a new invention, and would entirely defeat the end and intention of the bankrupt acts.

The three (a) judges were all equally clear that the man ought to be remanded.

Mr. just Foster added, that none of them preclude a further examination.

The late lond chief justice (C. B.) Wilmot also concurred in this; and said, that the clauses operate together, and are auxiliary to each other; and they certainly give a power of further examination. There are vast numbers of questions that may be asked under the examination, more than can be under the mere surrender and submission; a that may require surther time, or even arise afterwards. And he ought not to be discharged till he has fully answered. His present answer is most clearly desicient and that he

This man having, fince the last motion, submitted to be re examined by the commissioners, upon the former question, and

<sup>(</sup>a) 2 Bur. Rep. 1124.

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having been remanded by them, petitioned the lord (a) keeper to be discharged; annexing a copy of his deposition, giving an account of the manner in which he had disposed of 15030 h in 16 general articles, one of which was, "Expences attending the connection I had with the fair sex, 5500 h." But the lord keeper rejected his petition.

He afterwards tubmitted to a further examination by the commissioners, who thereupon met, and being fill diffatisfied with his answer, remanded him to Newgate; from whence he was, at his own inftance, now brought up again by Habeas Corpus. When it appeared, that at this last meeting, the fame question had been again proposed to him. In answer to which he particularized a woman upon whom he had spent 500c l. (from December 1758, to December in the year 1759;) and also particularized the times of fending and giving it to her but that no other person was privy to this; and that the woman (whose name was Sarab Powell, otherwife Taylor) is dead, as he has heard. That the knew him to be a bankrupt, and never returned the money or any part of it to him; and that he gave it to her for her maintenance and expences, and not for a fund for her future support, or wherefrom he could draw any advantage. That he knew, in the

<sup>(</sup>a) The late earl of Northington.

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year 1759, when he gave and remitted these lums to her, "That he was not worth any thing, and that he was remitting to her the money of his creditors." That he was acquainted with her five or fix years; but he cannot recollect what he gave her, or fpent upon her, during the second, third, or fourth years of their acquaintance; nor did he keep any particular accompt or memorandum thereof, either in those years, or in the year 1759; but speaks from memory only. That he did not take any of this money from his banker; but always took it from Mr. Thompfon (since deceased) who used to fell goods for him. That all letters between him (the bankrupt) and this woman, (except one or two) are burnt or destroyed.

Mr. Gould, Mr. Serjeant Davy, Mr. Coxe, and Mr. Stowe, argued, that he ought now to be discharged, as having given a full and complete answer to the questions propounded to him; and it is not material, in the presentirespect, whether it be true or falle; or whether his conduct was prudent or imprudent. If he be not now discharged, he must

be imprisoned for life.

od Mr. Serjeant (a) Hewitt, and Mr. (b) Norton, contro, infifted, that this answer was still in-

late of Ludgair-(a) The present lord chancellor of Triland. Young

complete

<sup>(</sup>b) The right honourable the lord chief justice in eyre, and speaker of the House of Commons.

complete and unfatisfactory; and that Perrott could not be indicted for perjury upon it. He was bound down by what was already proved upon him, to accompt for a very great fum of money which appeared to have come to his hands in this particular year : and this is by no means a fatisfactory accompt of the disposition of it, nor at all probable in itself. He lets the commissioners into no fort of light whereby to trace this money, or to discover what is become of it : it is not to be imagined or conceived, that 4, 5, 6, or 7 hundred pounds in a month could be paid her for maintenance and expences only; especially as it appears (as it does by what he himself has represented in one part of his examination) that the had only a man fervant and two maids, whilft the was at Bath. It might have been repaid to him or to some one in trust for him; or laid out in stocks, and those stocks transferred in trust for him. for him.

The court (a) held his answer to be incomplete and unfatisfactory; and ordered him to be remanded.

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Perrott's warrant of commitment oceafioned the publication of a quarto paniphlet. intituled. An authentic narrative of the proceedings under a committion of bankruptcy against John Perrott, late of Ludgate-The sight nonnurable the lord chief justice is

<sup>(</sup>a) 2 Bur. Rep. 1216.

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Hill (a), laceman, who was executed (b) in Smithfield, on Wednesday November 11, 1761.

for concealing his effects."

A copy of Perrott's warrant of commitment is added by way of appendix to this pamphlet, for this reason, viz. " many difficulties having arisen with respect to the commitment of bankrupts, it was defired by feveral gentlemen of the law," which warrant (continues the compiler of the pamphlet) may be confidered as an authoritative precedent, it having, after a folenin discussion of its merits and validity, received the approbation of the right honourable lord Mansfield, lord chief justice, and the (e) rest of the judges of the court of King's Bench, who unanimously declared it right and good in form and substance.

(4) It is observable, that Parott, in the warrant of commitment, is called "a merchant," the witness on his trial proved him a "linen-draper," and here he is declared to be " a laceman ;" this does not feem agreeable to the legal precision required in criminal proceedings. The bankrupt's description in the commission is the effential one. 130d 37

that purpose. Richard Town, w tallow chandler, was executed for concealing his effects in the byear 1912. and was the first and only person who fostered legally by the Bankrapt Taws. Alexander Thompfong nan bem broiderer, was executed for not furrendering in the year 1738. 88 . 410. 38 . 60)

(c) Viz. Mr. J. Denison, Mr. J. Foster, and Mr. J.

thew L. C. J. of C. B.) Wilmet.

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The warrant recites the statute of 5 Geo. 2. c. 30. thus:

"An Act for the better preventing frauds committed by bankrupts:

Whereas the true title of that statute is,

"An Act to prevent the committing of frauds by bankrupts."

We very well know, that it has been determined (a) that as the title of an act of parliament is no part of the act, the misrecital of it is not fatal; but in a later (b) case it was held, and by Holt, ch just too, that the misrecital of the title of a statute did vitiate; and we have this great man's reason for his opinion, viz. It is very true, (says he) that the title of an act of parliament is no more a part of the law, than the title of a book is part of the book (c); and

<sup>(</sup>a) Lord Raym. 77. This case, which was in the court of C. B. appears to have been determined upon the authority of one in which Hale ch. baron had determined the same way. See Hard. 324. pl. 4. Hole ch. just. declared the saying of Hale, if at all, was sudden; and notwithstanding his great veneration for him, he could not agree with him. 6 Mod. 63. See Cas. Temp. Hardon, 197. S. P.

<sup>(</sup>b) 6 Mod. 62. Bur. Lit. Rep. 4to. 38. Bul. Ni.

<sup>(</sup>c) This opinion was given before 8 An, ch. 19 for there

Chap. 6.

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chap. 6. There is for that reason no necessity to set it in the post where a party does set this out specially, he thereby ties himself up to an act so manded, and if he cannot produce such an one, hous gone; "Gould, J. agreed with Holt; Powell, J. gave no opinion, but said that he concurred with the other judges of the Common Bleas, soldy upon the authority of the opinion of Hale as reported in Hardres."

move are aware too, that had the bankrupt the warrance to the court in a proper manner, the court (b) must have remaided him by their rule to the same prison, there to remain until he fully answered to the satisfaction of the commissioners.

will extremely remarkable, that a warrant which had been fettled and approved of by some of the ablest of the profession, should be liable to so palpable an objection; and besides, we could not but admire, that as the commitment had been so much canvassed and striggted in Westminster ball, the

Rearing literary property, passed into a law, as otherwise it deems erroneous; herause, by sec. 2. of that act, the side of a beak is certainly considered as the most of similar part of it, since that, and that only, being registered in Stationers ball, according to the directions of the act, weste the statuable property in the author, acc, which is now settled to be the only property he can claim in his works. Rayn. Pres. to Stat. Geo. 11. xi.

(6) By ftat. 5 Geo. 2. c. 30. f. 18.

objection should have escaped the notice, not only of Sir James Barrow, but also of the compiler of the Authentic Narrative, profeffedly wrote on the very subject, and declared to include every transaction from the awarding the commission, to the time of the bank-

rupt's condemnation.

Belides, suppose Perrott had availed himfelf of the informality of the commissioners warrant, and had been remanded by rule of court, and had afterwards given the commillioners, notice, that he was willing and ready to Submit himself to them, and to make a full and fatisfactory answer to their question: as the bankrupt would not then have been in cultody by virtue of their warrant, could the commissioners by law have authorized the goaler to bring up the bankrupt before them is and as the court of King's Bench (even if it should happen to be term time) could not (having no jurisdiction of the matter) receive the bankrupt's fubmiffion, or his answer to the question, what method must the bankrupt have taken in fuch case in order to have procured his enlargement? as he would then have flood committed (as it feemeth) by virtue of as authority, which had not power to discharge him; for lord (a) Mansfield said, if a bankrupt should give a full answer, and the com-

which is now fertled to be the only property he constitution in his works. Raya. Pref. to Sigts ConnAl(a) miffioners

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missioners not be satisfied with it, the bankrupt would then be intilled to his sproper remedy; what is this but saying that a bankrupt must offer his answer to the commissioners, before her is intilled to his remedy in the court of King & Bench Aqua to yith

As we have mentioned the trial, condemnation and execution of Perrott we cannot help observing, that the petitioning creditor appeared to be one of the principal witneffes on that profecution; we observe it, because it is (a) held, that the creditor of a bankrupt cannot be a witness, for he swears to (b) increase his own dividend; belides, the compiler of the Authentic Narrative informs (e) us, that the bankrupt had the hardinessto bring an action in the court of Common Pleas, against the commissioners; for false imprisonment; which action the (d) affignees were by the (d) creditors authorized to defend;" fo that the petitioning creditor feems to have been interested both as a gainer and lofer; and his testimony ought not to have

(a) 2 Keb. Rep. 348: pl. 31. Sma. 507. 12 Vine

Abr. 11. pl. 28.

(e) 36. Firft Part.

<sup>(</sup>h) Stra. 507. And this matter of interest seems to be the reason why bail cannot be evidence for the defendant without consent. Keb. Rep. 296. pl. 131. Style 389. 3 St. Tri. 253. 2 Hawk. P. C. Ch. 46. Sec. 24.

<sup>(</sup>d) The petitioning creditor was one of them.

been admitted, if he was either, and whether the advantage were direct and immediate, or confequencial (a) only it at na w , wheneve

Lord (b) Coke fays, mifera eft fervitus, ubi Jus eft evagum aut incertum; and yet we find diversity of opinions in regard to the admiffion of ansinterested witness on a criminal proceeding; for Holt ch. just. (c) faid, he was not fatisfied, that a person interested could be evidence in a criminal matter; but Treby, chojust, C. B. before whom a second trial was had (d) faid, that though he paid deference to the judgment of B. R. yet his opinion was, that the evidence was good, though interested, and this as well on an indiffment as in an action, and that the party who was to get by the conviction might be evidence against against the commissionaniming adt

senten is further observable on this trial, that the petitioning creditor was the person to whom, (according to his own depolition on the trial) the banksupt was denied by agreement, which we believe was the first and only act of bankruptcy committed by, or at least proved against Perrott; here too, (we are forry to fay it) we again meet with contrarlety of opinions, for the late lord ch.

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kendent wirt out confert. Kiel. Rep. 206. pl (a) Co. Lit. 6. b. Sid. 237. pl. 14. 10 2 22

<sup>(</sup>b) 4 Inft. 246. (c) Comb. 360.

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which was no way prohibited by common law, and appoints a (d) particular manner of proceeding against the offender, as by commitment, information, &c. without mentioning an indictment, it feems to be (e) settled

(a) Field v. Bellamy. Hil. 15 Geo. 2. B. R. Tri. at Ni. Pri. 38. S. C. S. P. in lotidem werbis.

(b) Bromley v. Monday, at Guildhall. 2 June 1756. B. R. Tri. at Ni. Pri. 18. S. C. S. P. in totidem werbis.

B. R. Tri. at Ni. Pri. 38. S. C. S. P. in totidem werbis.

(c) But the learned author of a late publication questions this authority, and asks how such a denial can be said to be with intent to delay a creditor? Tri. at Ni. Pri. 38.

(d) S. P. in 12 Mod. 104. 2 Hawk. P. C. 7. chap.

3. feet. 6. 2 Bur. Rep. 805.

(e) 2 Rol. Rep. 247, 248, 398. Show. Rep. 398, 399. 3 Keb. Rep. 34. pl. 3. 273. pl. 13. Cr. Jac. 643. pl. 4. 3 Mod. 79. 4 Mod. 144. Carth. 263. Palm. 388. Sid. 434. pl. 28. 439. pl. 7. 6 Mod. 86. Stra. 679. Sef. Caf. 370. pl. 295. Twisden, just. said, that without negative words he conceived an indictment

at this day, that it will not maintain an indictment, because the mentioning the other methods of proceeding only, feems virtually to exclude that of (a) Indictment.

Now it appears, that flat of Geo. 2 c. 20. (upon which Thompson and Perrott were capitally convicted and executed) does not mention " indiffment," the words are " judgment or information? Therefore according to Hawkins; (whom Mr. juffice (h) Foster gives the character of the best modern writer on the crown law, except Hale) and according to the authorities before (c) cited, both Thompson and Perrott were illegally executed; because neither the non surrender to a commission of bankrupt, or the removal, concealment, or embezzlement of one's effects, was a capital offence at common law; and fince (as it (d) feemeth) an information will not lie for a capital offence, and an indictment is not a mode of proceeding directed by Stat. 5 Geo. 2. a prisoner indicted on faid act ought to be discharged by the court;

would lie, though the statute be introductive of a new law, and created an offence, which was none at the common law. Med. Rep. 34. pl. 82. Kel. Rep. 151. S. P.

(a) Hawk. Pl. Cr. chap. 25. fect. 24. p. 211.

(b) Foft. Cr. Law, 107.

(c) In fol. 223. Note (e). (d) 2 H. H. P. C. 151\*. Show. Rep. 109. 2 Hawk. P. C. 261. ch. 26. f. 3.

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for the law of England is a law of (a) mercy, and therefore it is the duty (b) of the court to be (c) indifferent between the king and prisoner, and to see that the indictment be good and sufficient in point of (d) law; the proceedings regular, the evidence (e) legal, and fuch as fully proves the point in iffue; and that nothing be urged against the prisoner, contrary to law and right (f); in order that justice be done the party (g); otherwise the court might by their erroneous judgment attaint the prisoner (b) unjustly.

When a man is indicted at the king's fuit, the king intendeth nothing but justice with favour, and therefore he will be contented that his justices shall help the offenders according to truth, as far as reason and

a) 9 Vin 16

<sup>(</sup>a) 2 Balft. 147. 2 Inst. 315. (b) 2 Hawk. P. C. 400. ch. 39. s. 2. (c) 2 Balft. 147. 2 Hawk. P. C. 400. chap. 39. feet. z. as occationed two person.

<sup>(</sup>d) 3 Inst. 29. 137. (e) 2 Hawk. P. C. 400. chap. 39. sect. 2. L. C. J. Coke says, in case of life, the evidence to convict the prisoner should be so manifest, that it could not be contradicted, 3 Inft. 29, 137. And lord Nottingham informed the House of Peers, as lord high steward on lord Cornwallis's trial for murder, that the evidence by which a prisoner is condemned, ought to be so very evident, and fo plain, that all the counsel in the world should not be able to answer it. St. Tr. See a Black. Com. 355. (c) Pan Aur 267

<sup>(</sup>f) 3 Inft. 29.

<sup>(</sup>g) 2 Bulft. 147.

<sup>(</sup>b) 3 Inft. 137.

juffice may foffer (a), And it is far better for the prilaner to have the judge's opinion for him, than all the counsellors at the bar. For these reasons it is presumed, that the law of England does not allow a criminal counsel in his defence upon indict-

ments (b).

It is observable, that most of the writers on the bankrupt laws, have prefumed to alter flat. 5 Geo. 2. c. 30. f. 1. as to the matter in question, for you will find, that (c) Bacon, (d) Viner, and (e) Burn, have all adopted the word " indictment;" and, can you believe it? the accurate Cay, hath actually abridged. "judgment" " indictment." We have had. the curiofity to look into and examine the expired acts concerning bankrupts, and we find that the word " indistment" is in themall; so it seems to be only a mistake, yet it unfortunately happened to be fuch an one, as occasioned two persons to lose their lives, which they had not forfeited to any law of this country, that I know of.

Two persons tried at the Surrey Affizes, for Lent, 1762, for defrauding their creditors in taking the benefit of the famous compulaive

<sup>(</sup>a) Doctor and Student, 282, 283. b. 2. ch. 48.

<sup>(</sup>b) 2 St. Tri. 726. edit. 1742. 2 Bulftr. 147. Doct. & Stud. 282. See 2 Hawk. P. C. 400. chap. 39. fect. 2,

<sup>(</sup>c) Bar. Abr. 267.

<sup>(</sup>d) 7 Vin. Abr. 128. pl. 5.

<sup>(</sup>e) Justice, 410. 112.

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clause of the first act of insolvency passed in his present majesty's reign, viz. 1 Geo. 3. ch. 17. fect. 46. had the good fortune to escape by an unaccountable mistake in penning the faid clause; the word "judgment" being inserted therein, instead of the word

" indictment."

It appears by the above authentic narrative of the proceedings against Perrott, that bis time was enlarged; and it also appears from the evidence given in the House of (a) Commons by Francis Capper, Elq. then a commissioner of bankrupt, that he was of opinion, that the clause in stat. 5 Geo. 2. ch. 30. s. 3 is for the (b) benefit of the bankrupt, to prevent his being surprised, if in the country, and not having notice to come up; and if the time be enlarged, that the penalty does not extend to the enlarged time; that he had heard of a trial of that kind, and an acquit-

(a) See the report of the committee appointed to confider of the laws relating to bankrupts, to whom the petition of feveral was referred, which report was read in the house, on Sourday & Juve, 1759,0921 Geo. 2.

and is entered in the Journals.

(b) For this reason I was always of opinion, that the bankrupt stime for surrendering ought not to be enlarged without his privity and confert; and if the innowaters (they being neither regulators of reformers in my confideration) of the bankrupt laws, should find, that be cannot be capitally convicted on his enlarged time, be may not in future be able to procure his time to be enlarged to easily as heretofore.

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tal upon it, at the Old Bailey; that he was concerned as counsel in that bankruptcy, and was told by the folicitor, that upon a like exception the party was acquitted.
The Great Seal never encouraged these

profecutions; on the contrary, lord (a) Macclesfield did in more inflances than one Juperfede a commiffion, where the bankrupt had not furrendered himfelf within the forty-two days, and his lordship declared that be took this

melbed to prevent a profecution.

From the above remarks and observations, I would know upon what law Thompson or Perrott was indicted? I would know by what law the petitioning creditor was admitted evidence against Perrott? I would know by what law Perrott's denial of bimfelf by agreement, in order to take out the commission, was given in evidence against him, on his profecution at the Old Bailey, for a capital offence, under the bankrupt laws?

Lord (b) Hardwicke faid, that though such a profecution might be carried on by a perfon who was not a creditor, yet by the words of the act of parliament, it looked as if the legislature intended, that there should be a concurrence of the creditors under the comcrept laws, fould hinoffilm 10 4001519 secured to mairal, convicted on his calarged tim

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<sup>(</sup>a) Aik. Rep. 222.

<sup>(</sup>b) Aik. Rep. 221. pl. 123.

His lordship further (a) observed that stat. 5 Geo. 2. c. 30. was a penal law and a fevere one, for it reached to the life of the bankrupt, and that a court of equity would not lend its aid to fuch a profecution, but the profecutor must go on in such manner, as the law prescribes, to prove the party bankrupt, and a felon, within the intent and meaning of the act of parliament, and therefore his lordship would not order the clerk of the commission to attend at the Old Bailey, with the proceedings, under the commillion. the commission is

It hath been faid, that if a bankrupt incurs the guilt of felony by not furrendering to, or by removing, concealing, or embezzling any part of his estate, real or perfenal, to 201. value, or any books, papers, or writings relating thereto, with intent to defraud his creditors, that in fuch case, even a supersedear of the commission, will not secure the bankrupt from a profecution for fuch felony; but the bankrupt ought to have an express pardon in form under the Great Seal; for felony cannot by law be pardoned by implication; and for this is instanced the infamous case of, perhaps the greatest and most unfortunate man this world ever produced, Sir Walter (b) Raleigh; and this case (a) Fol. 40. Note (c).

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<sup>(</sup>a) Aik. Rep. 222.

<sup>(</sup>b) Cro. Jac. 495. pl. 1. Hat. 21. 2 Rob Rep. 50. 8 St. Tri. 339.

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hath been urged by those who ought to know better, because their situation in life requires legal knowledge, particularly in bankrupt cases: there is not, as I apprehend: a fcintilla juris for this opinion, for among the requifites for supporting a profecution for felony under the bankrupt laws, are the two following ones, the commission,

and the act of bankruptcy.

As to the first, the Superfedeas under the Great Seal feems full as effectual to vacate all future proceedings under a commission, as the commission itself is to authorize any being had thereon. And as to the fecond, it hath been often (a) folemnly held and determined, that if after a plain act of bankruptcy, the bankrupt pays off, or compounds with all his ereditors, he is become a new man; and the fatisfaction of the creditors is generally the cause of the Supersedens; but be the Supersedens for what cause it may, it feems clearly an absolute legal bar to all profecution, as well as proceedings, under that commission for lord Hardwicke (b) declared, that fuperfeding a commission would entirely defeat the bankrupt's certificate (as it is called); if fo, will it not be too fevere to conftrue a Superfededs, which lord Hardwicke (c) refused Kalugas and this

<sup>(</sup>a) Fol. 40. Note (c).

<sup>(</sup>b) Aik. Rep. 145. pl. 84.

to grant for the fake of the bankrupt, not fufficient to prevent his ignominious death?

As to Raleigh's case, it does not apply in the least, for his case was an attainder upon conviction of the offence : yet, for the fake of argument, let us suppose a bankrupt capitally convicted under the bankrupt laws, discharged from prison, and appointed a commissioner of bankrupt wand fome years after this, government thould think proper to put in execution the former lentence of death; could the scrown doging Suchscafe may indeed require confideration, when it

In (a) case the bankrupt, after be hath obtained his certificate, and the fame been duly confirmed, fight neglect or refuse to attend the affiguees, in order to make up or fettle any accompt between him, and any debtor to or creditor of his estate, or to attend any court of record, in order to be examined (b) gridaupor ore than 40 % but told it presenter of the

old, if he hofe to leve the hea they had,

(a) Stat. 3 Geo. 2 C. 30. f. 36. 100 and gen double (b) A bankrupt, who has affigured and released all his estate and right to the affigures, may be examined as a witness for them. 2 Vern. 627. pl. 266. 2 Bac. Abr. 200. 12 Vin. Abr. 27. (L) pl. 2. Eq. Cal. Abr. 224. pl. 3. See Cal. Temp. Hardw. 267. The court of Common Pleas faid, that a bankrupt, after he had obtained his periodical machiness and the court of Common Pleas faid, that a bankrupt, after he had obtained his certificate, might be a withels. a Burcer's Notes, C. P. 253. but his having his certificate alone will not do, because if there should be more than sufficient to pay his creditors, he will be entitled to the overplus.

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touching the same, or for such other business as the affiguees shall judge necessary for getting in his estate and effects, for the benefit no least for his case was an attainder upon conviction of the offence

overplus, and consequently be swearing for himself. But a modern learned author informs us, that lord Hardwicke ch. just, made a distinction as to this matter; it is in these words : " The bankrupt cannot be evidence to fwear property in himfelf, or a debt due to himself, without a release of his share in the surplus and the dividends, for else he is plainly interested, but he may prove property in, or a debt dee to another. Tri. at Ni. Prin 41 alt appeared, that a callied printer, who had fince become bankrupt, was applied to by one of his creditors for a debt of 110% which he not being able at that time to difcharge, the latter propoled to him to draw in his favour upon W. and Co. for whom he had done business: the bankrops replied, that those persons then owed him only 40%, but that there were other fums of money, which would thortly become due from them; a bill of exchange was accordingly drawn on W. and Co. on the prefenting of which they repeated what the bankrupt had faid relative to their not having effects then in hand, to the amount of more than 40 l. but told the presenter of the bill, if he chose to leave it, that when they had, which might be foon, they would discharge the bill. The callico printer thortly after becoming bankrupt, and the bill never having been formally accepted, nor the contents thereof lati hed at the time of the drawer's failure, the affignees of the bankrupt's effate fued W. and Co. for 127 L. which appeared to be the amount of the balance of the account against them, on the bankrupt's books. This matter being tried at the fitting after Teinity term, 1772, a verdect was found for the defendants W, and Co. It was now moved for a new trial, on the following grounds, that the evidence of a bankrupt is not valid, which he hath obtained a

of his creditors, or on such (a) attendance fhall refuse to affift in such discovery, without good cause to be shewn to the commisfioners, for his neglect and refusal, to be allowed by them as sufficient, such assignees making due proof thereof upon oath or folemn affirmation before the commissioners, they are to iffue a warrant directed to fuch person as they shall think proper for appre-

release, or a certificate of conformity; that no converfation, unless it be relative to matter of fact, should be received as evidence; and that it did not appear, that the defendants were indebted to the bankrupt in the fum of 110%, at the time the bill became payable! but all the above objections were over-ruled, and the following points were delivered as law by the court, viz.

1. That the testimony of a bankrupt is competent, when it does not tend to leffen his effate, because the law prefumes, that no man will atteff unjuftly against

his own interest.

his own interest.

2dly That any conversation may be given in evidence, on behalf of a person, which, if of a contrary

nature, might be given againft him. 19190 10

adly, That as to the last objection, lord Mansfield, who presided at the trial, declared it was the first time he had heard of it, and could not therefore allow it now, but that he was opinion, that a bill of exchange will be at all times as good against the drawer, or person on whom it is drawn, if the contingency ever happens, in which the party promised payment, as if it had been accepted by him, in all the formalities of law and custom. Mich. Term, 13 Geo. 3. B. R. 1772. Anon. See 3 Will. Rep.

(a) For which attendance the bankrupt is to be paid 2 s. 6d. a day by the assignees, out of his estate. Stat.

5 Geo. 2. c. 30. f. 36.

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hending the bankrupt, and him to commit to the county goal, there to remain without bail or mainprize, until he shall duly conform to the satisfaction of the commissioners, and be by them, or the special order of the Great Seal, or otherwise by due course of law, discharged; and the goaler of the prison to which the bankrupt shall be committed is to keep him in close custody, within the walls of the prison, until he shall be duly discharged as aforesaid, under the pains and penalties before (a) mentioned, for such goaler suffering such prisoners committed pursuant to this act, to escape and go at large.

It seems that the commissioners can never exercise this power, because the act itself does not invest them with it till after the bankrupt has obtained his certificate; and by the following case, lord Hardwicke inclined to be of opinion, that a bankrupt was not obliged to attend his assignees, after the expiration of the forty-two days, or at most after such further time as should be allowed the bankrupt, for sinishing his examination; before the end of which time it is impossible for the bankrupt to obtain his certificate.

The affignee under a commission of bankrupt gave notice in writing to the bankrupt to attend him, in order to explain several

<sup>(</sup>a) See ftat. 5 Geo. 2. c. 30. f. 18, 19.

matters relating to his estate after the fortytwo days were expired, (during which time he is to be free (a) from all arrefts, restrainers, or imprisonment) and before the certificate

was figned.

The bankrupt would not attend upon any other terms than figning his certificate, and the application to the court was founded upon this, that the bankrupt had refused to attend, contrary to the (b) act of parliament. Lord chancellor (c) Hardwicke said, that notwithstanding stat. 5 Geo. 2. had these general words, that " every bankrupt not in prison or custody, shall, at all times after his furrender be at liberty, and shall attend the affignees upon every reasonable notice in writing for that purpose, by them given unto him, or left for him, at his house or place of abode, in order to affift, and shall assist the affignees in making out the accompt of his estate and effects:" yet that the subsequent (d) clause that " every bankrupt having furrendered, shall at all seasonable times before the expiration of the forty-two days, or such further time as shall be allowed to him, to finish his examination, be at liberty to inspect his books, papers, and writings, in the presence of the affignees, or some per-

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<sup>(</sup>a) Stat. 5 Geo. 2. c. 30. f. 5. (b) Stat. 5 Geo. 2. c. 30. f. 4.

<sup>(</sup>c) Atk. Rep. 148. pl. 88.

<sup>(</sup>d) S. g. of g Geo. 2. c. 30.

fon to be appointed by them for that purpole, and to take and bring with him for his affiftance, fuch perfons as he shall think fit, not exceeding two at any one time, and to make out fuch extracts and copies as he shall think fit, the better to enable him to make a full and true discovery and disclosure of his estate and effects; and in order thereto the faid bankrupt shall be free from all arrests, restraint, or imprisonment of any of bis (a) creditors, in coming to furrender, and from his actual furrender to the commiffioners, for and during the faid forty-two days, or such further time as shall be allowed to bim, for finishing kis examination," seemed to confine it to the forty-two days, or the enlarged time at most, and therefore the bankrupt's protection from arrefts, &c. could extend no further; the chancellor (b) asked the petitioner's counsel, if their client would confent to indemnify the bankrupt from arrefts, but he refufing to do it, his lordship proposed that he, as affignee, should only undertake for the creditors, who had fought relief under the commission, that they would not arrest him, and if so, he would order the bankrupt to attend; for he said, he should

(b) Atk. Rep. 149.

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<sup>(</sup>a) Lord Hardwicke on another occasion said, that this act provided against arrest by creditors, and that bail not being creditors till damnified, were therefore not within the description. Atk. Rep. 238. pl. 130.

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not pay any regard to the danger the bankrupt might run, from his creditors at large; this petition at the request of the petitioner was ordered to stand over till the next day of petitions, that he might endeavour, in the mean time, to get the rest of the creditors under the commission to consent to these terms; upon the whole, lord chancellor said, that the clauses in the act of parliament relating to this marter were very dark and obicurely penned, ariling chiefly from the words forly-lawe days" being thrown into the latter clause.

The (a) commissioners may examine upon oath the wife (b) of the bankrupt for finding out any (c) discovery of his estare, goods, and chattels, concealed, kept, or di posed of by his wife, in her own person, or by her

ion whereof much of the bankrupt's efface

(a) Stat. 21 Jac. c. 10. f. 6.
(b) Before this statute the court of Common Pleas was moved, to know whether the wife of a bankrupt could be examined by the commissioners upon the statute of bankrupt, and they were of opinion the could not be examined. Brownl. 47.

(t) But the wife cannot be examined against her hulband touching his bankruptcy, or whether he had committed any lact of bankruptey, or as to how or when he became bankrupt; and if the commissioners commit her, sand though the warrant of commitment imentions is to be, as well for refuting toodifeover the -goods of the bankrupt, beishe time and manner of his bankunpter, tyersthe commisment was held the al, and the wife ordered wobe discharged Wil. Rep 610, 611. oners have thought them Ales 8x flife i in re Arfinie fach awo offer their code; we prefime this practice has obS

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own act, or means, or by any other person, and the shall incur such danger and penalty for not coming before the commissioners, or for refusing to be sworn and examined, or for not disclosing the truth upon her examination, as by former laws is already made and provided against any other person in the like case.

The occasion of making the above statute, was, because (a) some doubt had been made whether the commissioners had power to examine the wife of the bankrupt suspected to have or detain his estate, goods, or chattels, by reason whereof she did daily conceal and convey away, and cause to be conveyed away much part of her husband's monies, wares, goods, merchandizes, and other estate, to persons unknown to any but herself, by reason whereof much of the bankrupt's estate was concealed and detained from the creditors.

hall have such costs (c) as the commissioners that things beautifus and state that

o (a) Presmble to flat 21 Jac. c. 19. f. 5.

(c) Where witnesses are brought before the commission contempt; or where on their examination they appear to the embezzled or concealed the bank-rupt's effects, or been otherwise guilty of any misconduct in regard to the bankrupt's estate, the commissioners have thought themselves justified in resulting such witnesses their costs; we presume this practice has obtained

shall think fit, to be rateably borne by the creditors; and if any person other than the bankrupt, either by subornation of others, or by his own act shall wilfully and corruptly commit wilful perjury by his depositions, to be taken before the commissioners, the party so offending, and all persons who shall unlawfully and corruptly procure any such unlawful, wilful, and corrupt perjury, shall therefore be indicted in any of the king's courts of record, and shall suffer such pains as are limited by the (a) statutes concerning perjury.

The court of king's bench (b) inclined to be of opinion, that a witness was not to pay universal obedience to all questions asked him by the commissioners, nor was he to answer to any thing which tended to accuse (c) himself; but only what he knows of any person's carrying off any part of the bankrupt's estate, but not by himself; and though they may commit a man for resuling to be examined concerning the estate of the bank-

tained as founded on the equitable power given the commissioners by the statute, for there is no express direction in it for that purpose.

(a) Viz: Stat. 5 El. c. 9. 2 Geo. 2. c. 25. f. 2. per-

petuated by 9 Geo. 2. c. 18.

(c) 3 Keb. 837. pl. 74. S. P. lord ch. Just. Holl said, that he was not bound to answer any thing criminal, that it was criminal to embezzle any goods after the bankruptcy, but not before, Comb. 391.

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rupt, yet they are not judges, and their proceedings are traversable, because their power of imprisonment is only (a) until, &c. and it may be examined in an action, whether they have pursued their authority or not; for their act in this respect is only (b) ministerial, and the commitment is not intended as a punishment, but only as a mesne process to bring the party to justice, or to make him do his duty.

Lord Raymond (c) said a man might prevaricate on his first examination for half an hour, yet in the conclusion he might make a full and ample answer, and therefore it was not at all proper to send a man to prison for such a piece of conduct; and that nothing was more common than such behaviour on trials at mis prives:

Lord chancellor (d) Hardwicke, upon petition, limited the examination of the bank-rupt's mother to her fon's trading only; but refused to restrain the commissioners from asking any particular question relevant to her son's being a trader, or any circumstances relating thereto.

The mother was asked by the commufioners, whether her for was a trader or not, or had any concern in the brewhouse? she

affwered negatively. I His lordship would not therefore reftrain the commillioners from inquiring into any eircumltances which might make him a wader, as for instance; did your fon affigit over any mare he had in the brewing trade to you all for if the answered in the affirmative, that would hew he was a trader before he executed an affigument " His lordthip faid further, that he would not make any order that the mother should be at liberty to be arrended by countel upon her examination, because it might be made a precedent in other commissions, and he thought an inconvenience would arise if allowed in every case, and therefore only recommended is to the commissioners, in this particular instance, to indulge the mother with counseling adagrees

A person summoned under a commission of bankrupt in order to be examined touching his trade and dealings with the bankrupt, instead of attending the commissioners, petitioned lord chancellor Hardwitte, that he might be examined on (a) interrogatorics, and might have a copy of them, and a month's

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or giving money for bank notes, cannot affect one as a trader with that bankrupt, and confequently the party cannot be burt by such discovery, nor would his lord-triffing and immaterial questions, and therefore would not direct the examination to be upon interrogatories.

Ath. Rep. 206.

me to prepare himself for his examination, and that the commissioners slight be restrained (a) from alking him questions touching \* notes given for money, or bank notes, or goldfmith's notes, or money paid by him for bank bills, or his or other banker's cash notes. The petition was dismissed upon opening, without hearing the affignees counfel. ,

A man after he had been examined under a commission of bankrupt, by virtue of the commissioners lummons, grounded on my lord chancellor's order, as he was returning home, was arrested by a sheriff's officer, and kept in custody feveral hours pupon which the party arrested applied to lord Hardwicke to be discharged, Lord (b.) Hardwicks thought this matter of great consequence, as to commissioners of bankrupt in general; as to the liberty of the subject; and as to other commissioners under the great seal, as of charitable wies, commissions of lunacy, &c. for that tham arrefts might be fet up in order to prevent their attendance to be examined as witnesses before such commission-And his lordship ordered, that the theriff's officer before the then next day of or giving money for hand teter, cannot affect one at a

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<sup>(</sup>a) The lord chancellor would not limit or refran the commissioners in their examinations, for if he did, it would be attended with expence and incontented from applications of this kind. Att. Rep. 205: pl. 108. See note in the preceding page. Ach. Rep. 200.

<sup>(</sup>b) Atk. Rep. 55.

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pecitions, hould give fecurity to be approved of before a malten, for his attending de die in diem to answer interrogatories, to be exhibited concerning the contempts charged upon him in the affidavit of the party arrested; and if the officer should not give such security, it was further ordered, that he should stand committed to the Fleet for the faid contempts; and if the officer should give fuch security, then it was further ordered, that the party arrested should, within a week after fuch fecurity given, exhibit interrogatories before the mafter, for examining the officer touching the faid contempts, and that the officer should attend the said master de die in diem for that purpole.

Bracy was examined before commissioners of bankrupts, for having taken certain goods of A who was a bankrupt, and Bracy made depositions. Afterwards the commissioners of bankrupts assigned these goods to the creditors of A. who brought an action against Bracy. And now Bracy moved in B. R. that he might have a copy of the depositions in order to defend himself, upon allegations that they were in nature of a public memorial, and that by ignorance and surprize he had subscribed many things to his prejudice. But the motion was (a) denied, and the

<sup>(</sup>a) Lord Raym. 153. Nor will the court compel the commissioners to give the witness a copy of the interrogatories

court faid, that these depositions were not (a) of a public nature, but taken by the com-

missioners to defend themselves.

The affignees suspecting the bankrupt had made concealment, examined a great many of his relations at Guildball, brought a bill in chancery against the very same persons for a discovery of those concealments. Mr. (b) Green moved, on the part of the defendants, that they might be allowed to look into their depositions before the commissioners, in order to make their answer consistent. lord (c) Hardwicke would not grant the motion, for (he faid) as truth was always uppermost, they might, if they pleased, put in an answer confistent with what they had already fworn in their depolitions, supposing them true; if falle, they swore at their own peril, and would not give leave to fee them, merely for their own fecurity, that they might not swear differently in one, from what they had done in the other.

Depolitions (d) taken by commissioners

gatories, though the man fwears he is illiterate, and cannot tell whether they wrote his depositions right or not. Lil. Abr. 286. D.

(a) Nor now, unless they be entered of record in

pursuance of that. 5 Geo. 2. c. 30. f 41.

(b) The gentleman from whose original plan and papers this book was compiled.

(c) Atk. Rep. 289. pl. 157.

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upon a comminment of bankrapen hattmos be given in evidence on a trial (a) at comther he was bankfuper de hier, or bio prove any matter depending upon ir, because (b) the other party could not cross examine the party twom, and this is the common course. In trover defendant was charged with his

confession in a deposition taken before commillioners of bankrupt, and chief justice (e) Raymond refuled to let the defendant into any parot evidence to explain the vo voigue

Notwithstanding the plaintiff had obtained an order to read the proceedings in a commission of bankrupt against T. as an exhibit in the cause, and amongst the rest the exam nation of M. L. taken before the commillioners under the faid commission, vet ford chancellor (d) Hardwicke refused to let the examination be read at the hearing, because it was not proved in the cause, that there was fuch an examination taken before the commissioners, for the proceedings in a infilted on in his examination

miffioners was offered in évidence, and the court held "it good enough; but this being opposed by defendant's rupt confessed. 2 Keb. Rep. 348. pl. 31.

(a) Lord Raym. 220. See No. Pri. 228. Theo. Ed.

(4) 2 Stra. 794.

<sup>(6) 21</sup> Vin. Abr. 352. pl. 9. 2 Rel. Abr. 679, pl. 9.

commission of bankrupt against T. were as to

M.L. Res inter alias afta. On bill brought in chancery against Murray to fet afide a fraudulent affignment of an annoity from Myers to Murray, as bring made for no confideration, and subsequent to an act of bankruptcy ; plaintiff's countel offered to read the examination of Murray's attorney, taken before the commissioners, who acted in the commission against Myers, as an evidence of the fraud, and of an act of bankruptcy by Myers, previous to the affignment of the annuity to Murray. But Fartefour (a) mafter of the rolls would not allow the examination to be read, to affect the interest of arthird person; and was of opinion, that the plaintiff could not be entitled to this evidence unles Murray's attorney had been examined in chief in the cause. But his honour permitted the plaintiff to read the examination of Murray taken before the commissioners, because the answer having let up a different right to the annuity, from what he had before infifted on in his examination, the examination might in such case, be sead, to flew the contrasiety and inconfifence between Murray's answer, and his examination taken before the commissioners.

The commissioners having once examined

(6) 21 Fin. Abr. 352. pl. 9. 2 Rol. Abr. 679. pl. 9

(a) 3 Ak. Rep. 415. pl. 147. 1407 218 2 (1)

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a man, cannot examine him again, unless is be upon a new (a) commission.

Lord chancellor (b) Nottingham feemed to be of opinion, that a defendant should be put to answer in chancery to the same matter, to which he had been formally examined, by the commissioners on oath.

One Bracy was committed by commissioners of bankrupt for refuling to answer, and they concluded their warrant thus, " until be conform (c) himself to our authority, and be thince delivered by due course of law;" and upon the return of an babeas corpus he was (d) difcharged, because this conclusion was not (e) purfuant to the flatutes of bankrupt.

fa) 2 Slow Rep. 162. pl. 99 but if their examinations be lott by fire, &c. quere whether there ought, in such case, to be a new commission. 2 Show. Rep. 102. pl. 99. By flat. 5 Geo. 2. c. 30. f. 41. the commission and proceedings may, on pention to the great feal, be entered of record, and copies given in evidence in case they happen to be loft.

(b) 2 Chan. Caf. 73.

(c) The court held the word conform inflead of the word fulmit to be well enough, because it was of the

fame fense. Salk. 348. pl. 3.

(d) Carth. 153. lord Raym. 100. 5 Mod 309. Cas. of Set. and Rem. 236. pl. 278. Cal. Temp. Holt, ch. just. 94. pl. 3. Sef. Caf. 332, 335. Barnard, K. B. 399. 2 Lord Raym. 851. Fortef. Rep. 274.

(e) Which being a special authority to commit, and in reffraint of liberty, ought to be confirmed flictly, and the very words of the flatutes pursued. 5 Mod. 309. Comb. 390, 391. Salk. 349. 2 Sira. 880.

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One committed by the commissioners for refusing to discover the bankrupt's estate discharged, because the return to the babeas corpus did not, 1. express any quorum (a) in the commission; 2. because it was, (b) "committed in custody," instead of taken," which is the usual torm; and 3. because it said "this is the cause of taking or detention," which is uncertain, it ought to have been detention only.

## CHAP. VII.

The Commissioners Certificate of the Bankrupt's Conformity, and herein of his Discharge.

writing under their hands and seals to the great seal, that the bankrupt hath made a full discovery of his estate and effects, and in all things conformed himself according to the directions of this act, and that there doth not appear to them any reason to doubt of the truth of such discovery, or that the same is not a full discovery of all his estate and effects; and the commissioners are further to

(a) 3 Keb. Rep. 837. pl. 74. the querum claufe is totally omitted in modern commissions.

(b) For this is as if the commitment were by the officer who makes the return. Ventr. 323. 324.

(c) Stat. 5 Geo. 2. c. 30. f. 10.

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certify that four parts in five of (a) number of the bankrupi's (c) creditors the bankrupi's (c) creditors who chave duly promed their edebis before ment's of charge in purtuance of this act.

(a) That is four out of five? If only five creditors have proved debts, few must fign; if fewer creditors than five have proved debts, shey must all fign; and in order to afcertain how many must, in a large number of creditors, it will be necessary to divide the number by five, and to fubstrate the dividend from the given number, and the remainder will be the number of creatives who must fign the certificate; for example, suppose the number one hundred and fifty.

Number

of the power by which any togion thereby authorized

that tigh activity niversal wolfort. State 24 Geo. 20 C.

and was of opini Acordioza person who had a debt

(b) The same method must be observed to find out the walks as was sort the number of supposed for instance, the debts amount to the sum of twenty seven thousand two hundred and forty one pounds.

this day age secrebacate in m. I of the capacities menthered in telloubioib 8447) 1427 1427 that the fame hir. Barca diepes informs as 8442 the fame lord Hard-

ser. Sarca d'epes informs as 8442 the lant ford riora electe was abord without rung 159712 hat a perion onder a committion of Bankrupt might pro- a debt in right of he wife, and yet bire, foorquitary 20 his own right, for a debt due to himself from me himselfupt, 3 dik.-Rep.

(c) Who must be creditors for twenty pounds respectively; and their figning, or the persons by them respectively authorized for that purpose, must be proved to the commissioners by affidavis, or officiation industring. Stat. (Geo. 2. c. 30. 1. 10.) The letter of attorney of any creditor residing in foreign parts attested by a Notary Public in the usual form, shall be sufficient evidence of

them under the commission, first (a) signed the certificate and testified their consent to the allowance and certificate, and to the bankrupt's discharge in pursuance of this act.

A question was, concerning the (b) form of certificates on the late (c) act. Per lord C. (a) Parker, the commissioners are to certify one day, that the bankrupt bath in all things conformed, &c. and then the next day the creditors certify on the same parchment their consent, at the foot of which the commissioners are to certify, that the creditors have

I ico f so dividends of the power by which any person thereby authorized shall fign any bankrupe's certificare. Stat. 24 Geo. 2. c. 57. f. 10. Mr. Baron Athyns inferms us, that lord Harduicke was of opinion, that a person who had a debt in his own right, and another debt as executor, could not fign a certificate in face diffinct rights, for both are to be confidered as his own particular debt. Atk. Rep. 86. But we apprehend this is not law, for quante due Juna concurrent in una perfena, equemeft ac fi effent in dieurfis. 4 Rep. 118. 7 Rep. 2. 14. and that a creditor may at this day fign a certificate in many of the capacities mentioned in fol. 96, &c. It is observable, that the fame Mr. Baron Atkyns informs us, that the same lord Hardwicke was afterwards of opinion, that a person under a commission of Bankrupt might prove a debt in right of his wife, and yet bring an action in his own right, for a debt due to himfelf from the bankrupt. 3 Aik. Rep. (1) Who mult be creditere for twenty progilleeots

(a) By ord Hardwicks, Ask. Rep. 74.

(b) See the form in Appendix.

(c) State 5 Geo. c. 24. f. 16. which perfectly agrees with the above starute of 5 G. 2. c. 30. f. 10. in sub-

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confented acording to the forms of the act (a). And the library barding servicing

Lord (b) Hardwicke refused to supersede a commission, though on the petition of a bankrupt who had a deed of release of all demands from his creditors; and this he refused for the sake of the bankrupt, because, fuperfeding the commission (he faid) would entirely defeat the bankrupt's Certificate.

A man who has a debt may come in under a commission and prove his debt, and afterwards he may bring an action at law, and the court will not absolutely stop him from bringing an action, but put him to his election, and even then allow (c) him to affent to or dissent from the (d) certificate.

the source of what will give the beautiful and it

(a) The present method of getting a certificate figned, is to engross the certificate upon a treble fix-penny skin of parchment, leaving the date blank, underneath which you add the creditors confent; when the proper number and value of creditors have figured the confent, of which you must have an affidavit, (see the form in Appendix) you get three commissioners to figu and feat the certificate, first filling up the date, viz. the day they fign and feal. For further instructions in this matter, fee Appendix.

(b) Aik. Rep. 145. pl 84.

(t) Lord Hardwicke faid, the reason of the court for fuch order was, to make the remedy against the person effectual; for otherwise the person may, by the rest of the creditors, be absolutely discharged from the remedy which this creditor has elected to take. Ark. Rep. 220. And lord Tolber delivered himself to the same effect. 7 Vin. Abr. 1941 pl. 20.

(d) Atk. Rep. 104. pl. 55, 220. pl. 121.

Unless

Unless a person proves a debt or shews a reasonable ground for a (a) claim, he is not (b) within the rule for affenting to or diffenting from a certificate. b s bad on a quidras

Lord (c) Hardwicke laid it down for a role, that where there was a joint and separate commission, a creditor under the joint commission might come in under the separate, and affent or diffent to the certificate of the bankrupt un-

der the separate commission.

After the certificate is figned by the creditors and commissioners, it shall be laid before the lord chancellor (d) together with the affidavit or affirmation of the creditors figning the same, or the persons by them respectively authorized fo to do, and also the warrant or authority to fign, in order for the allowing (e) and confirming thereof, which certificate,

(a) A claim will not entitle a creditor to fign the cer-The styling all and sound from one tificate.

(b) Aik. Rep. 82.

of the analysis of the day way, for the (c) Atk. Rep. 97. pl. 45. (d) Stat. 5 Geo. 2. c. 30. f. 10.

(e) A certificate allowed in the life-time of the hankrupt, though not confirmed by the great feal till after his death, is good, for the operative force of it arises from the confent of the creditors, and when confirmed, it has its effect from the beginning; by lord Hardwicke. Ath. Rep. 77. 2 Bur. Rep. 718. At a meeting of the commissioners to review a bankrupt's certificate, several new creditors came in and proved their debts, but as they did not join in a perition to fet afide the certificate, as fraudulently obtained, the court would not delay the allowance thereof, as it would be a great hardship on the

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upon the bankrupt's making oath, or being of the people called Quakers, folemnly affirming in writing, that the same and the confent of the creditors thereunto were obtained fairly and without fraud, may be allowed and confirmed by the great feal, or by two (a) justices of the King's Bench. Common Pleas, or barons of the Exchequer, to whom the confideration thereof shall be referred by the great feal; and any (b) creditor of the bankrupt may be heard, if

bankrupt: by lord Hardwicke. Atk. Rep. 74. 75. Where four parts in five in number and value of the creditors have figned the certificate, the court will not stay it on the petition of persons, whose demands on the bank-rupt's estate depend upon an account to be taken, and where they do not swear to a balance in their favour. certificate, but they oughtog. lq. 180.qsR. sik

a mandamna mould lie to compel an airc

(a) Formerly the judges had the cognizance of certificates, but being found inconvenient, the great seal has taken it to itself. Atk. Rep. 87.

(b) Though a creditor of a bankrupt under 20% is excluded from affent or diffent to the certificate, yet as he is affected by the confequence of allowing it, he hath a right to petition, and shew any fraud against allowing the fame. 7 Vin. Abr. 134. pl. 18. Sir Flercher Norton faid, that as well creditors who have figned, as those who have not figued, may be heard against the allowance, for the act fays, " any creditors" may " object to it," and they are not confined by any restrictive words whatsoever, to matters of frand or unfairnes; but left quite at large. Lord Manifield faid, certainly they are not for confined, either by law or practice; and any creditor whatfoever may object to the allowance. 2 Bur. Rep. 718.

9d ) 211. Rep. 83

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he thinks fit, before the persons aforesaid against making and confirming the said certificate: for which purpose the great seal gives notice in the Gazette, that by virtue of Stat. 5 Geo. 2. c. 30. the certificate will be allowed and confirmed, as the said act directs, unless cause be shown to the contrary, within twenty-one days from the said advertisement.

Certificates (faid lord (a) Hardwicke) are matters of judgment, and he did not know that a mandamus would lie to compel an allowance, for it was discretionary in the commissioners first, and afterwards in the lord chancellor, and yet that it ought not to be arbitrary, either in the commissioners or the chancellor, to say, we will, or will not, allow a certificate, but they ought to be governed entirely by the fair or fraudulent behaviour of the bankrupt.

Signing the certificate in less than three months after the commission issued, lord Hardwicke (b) thought too precipitate, as the bankrupt was a trader in Ireland, and might be presumed to have large debts standing out against him there; and it appeared also, upon the face of his examination, that the greatest part of his books were then in Ireland, so that he had not made a full disclosure or discovery, so as to intitle him to his certificate.

<sup>(</sup>a) Att. Rep. 82.

<sup>(</sup>b) Atk, Rep. 83.

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Lord Hardwicke (a) directed a certificate to be stayed because it was signed within two months from the issuing the commission, and disapproved extremely of commissioners being so precipitate in signing certificates, and said that such hasty proceedings inverted the very intention of the acts of parliament which were made in favour of creditors, but were too often abused for the service of insolvent persons.

The certificate being signed upon the same day with the bankrupt's last examination, and two thirds of the creditors living in Guernsey, the allowance thereof was stayed, for lord Hardwicks (b) said, that the admitting such a certificate as this, would be turning the edge of the law against creditors in favour of bankrupts, which was not to be suffered

in a commercial country.

The certificate of bankrupt's conforming, and the allowance thereof according to the directions of this (c) statute, shall be sufficient evidence of the trading, (d) bankruptcy,

(a) Ack. Rep. 84. pl. 32.

(c) Stat. 5 Geo. 2. c. 30. f. 7.

commission,

<sup>(</sup>d) Previous to this statute, all the judges of the King's Bench were of opinion, notwithstanding 5 Geo. c. 24. f. 30. [expired] provided that a bankrupt's certificate should be given in evidence, and be a full discharge of any action which should be brought by any creditor of the bankrupt, that yet it was still necessary to prove an act of bankruptcy. Stra. 553.

commission, and other proceeding precedent to the obtaining thereof; and a verdict shall thereupon pass for the defendant, unless the plaintiss, in such action, can prove the certificate was obtained unfairly, or by fraud, or can make appear any concealment by the bankrupt, to the value of tol. And if a verdict pass for the defendant, or the plaintiss shall become nonsuited, or judgment be given against the plaintiss, the defendant shall recover his full costs.

All certificates which have been allowed, or to be allowed, and entered of record, or a true copy of every certificate figned and attested, as herein (a) is mentioned, may be given in evidence in any court of record, and without further proof taken to be a bar, and discharge against any action for any debt contracted before the issuing of the commission, unless any creditor of the person, who has the certificate, can prove it was fraudulently obtained.

Every bond (b), bill, note, contract, and agreement, or other fecurity whatfoever made or given by any bankrupt, or by any

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<sup>(</sup>a) Stat. 5. Geo. 2. c. 30. S. 41.

<sup>(</sup>t) A creditor petitioned the lord chancellor Parker against the allowance of the bankrupt's certificate, who, in consideration of the plaintiff's withdrawing his petition, gave him a bond for the whole debt. The certificate was afterwards allowed, and the creditor sued

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other person, unto, or to the use of, or in trust for any creditor, or for the security of the payment of any debt or sum of money due from the bankrupt, at the time of his becoming bankrupt, or any part thereof, between such time and his discharge, as a consideration or to persuade him to consent to, or sign any such allowance or certificate shall be void (a).

Nothing in stat. 5 Geo. 2. c. 30. shall grant any privilege, benefit or advantage to any bankrupt whatever who hath on the marriage of any of his (b) children given above 100l. unless he shall prove by his books fairly kept, or otherwise upon his oath, or being of the people called Quakers, upon solemn affirmation before the commissioners, that he had at the time thereof, over and above the value so given, remaining in goods, wares, merchandizes, ready money, or other estate real or personal, sufficient to pay unto every cre-

the bond against the bankrupt, who pleaded the act of 5 Geo. 2 and that the bond was obtained in order to procure his discharge; but lord chancellor refused to relieve the bankrupt, and dismissed his bill with costs. Wil. Rep. 620. pl. 181.

(a) Stat. 5 Geo. 2. C. 30. f. 11. Ak. R. 105. 106.

(b) Lord Hardwicke faid, that as this clause was a penal one, it ought to be confirmed firstly, and therefore to be confined to the children of the bankrupt, and not be extended any further. Atk. Rep. 86.

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ditor his full debt; or who shall have lost in one day five (a) pounds, or in the whole 1001, within twelve months next preceding his becoming bankrupt, in playing at cards, dice, tables, tennis, bowls, billiards, shovelboard, or by cock-fighting, horse-races, dogmatches, or foot-races, or other pastimes or games whatfoever, or by bearing a share in stakes, wagers, or adventures, or by betting on the fides of those who play, act, ride or run as aforefaid; or who, within one year before he became bankrupt, shall have loft 100/. by contract for the purchase, fale, refusal, or delivery of any flock of any company or corporation whatever, or any parts or shares of any government or public funds on fecurities, where any fuch contract was not to be performed within one week from the time of making the contract, or where the flock or other thing fo bought or fold was not actually transferred or delivered in pursuance of the contract (b).

In order to prevent the many abuses committed by bankrupts, and persons who,

<sup>(</sup>a) If the bankrupt has lost 51. at one time, and the fact shall be proved before the allowance of the certificate, Lord Chancellor Cowper (when a counsel) was of opinion the certificate ought not to be allowed either by the commissioners of bankrupt, or by the great seal. Beaves's Lex mercat, redivine, 499.

<sup>(</sup>b) Stat. 5 Geo. 2. c. 30. f. 12.

with their privity attempt to prove fictitious and pretended debts under commissions of bankrupt, that fuch persons may be enabled to fign their confent to the certificates for discharging such bankrupts from their debts, it is enacted, that where any person shall fraudulently fwear, or being quakers affirm, before the major part of the commissioners named in any commission of bankruptcy, or by affidavit or affirmation exhibited to them, that a fum of money is due to him from any bankrupt, which shall not be really so due, and shall in respect of such pretended debt sign his confent to the certificate for fuch bankrupt's discharge from his debts, unless such bankrupt shall, before such time as the commissioners shall have signed such certificate, by writing by him figned and delivered to one of the commissioners or one of the affignees, disclose the faid fraud, and object to the reality of such debt, such certificate shall be (a) void, and such bankrupt shall not be discharged from his debts, or have any of the benefits of 5 Geo. 2. C. 30.

When the commissioners have assigned the bankrupt's estate, and given him his

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<sup>(</sup>a) Stat. 24 Geo. 2. c. 57. f. 9.

(a) certificate and discharge they have (a)

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It has been (b) faid, that it is not in the power of the great feal, after a certificate had been once duly allowed and confirmed, without any objection made by the creditors, and after the fame has been delivered to the bankrupt, and enjoyed by him for feveral months, legally to recall fuch certificate exofficio, and deprive the bankrupt of the benefit of his discharge, upon the account of a fact which was never proved, or ever objected to, before the allowance of the certificate; because (by the statutes) conforming to the acts, and a certificate confirmed, is made an actual difcharge of the bankrupt's debts, due at the time of his bankruptcy, and a revocation after the debts are once extinguished, seems to come too late.

The above was the opinion of the late lord chancellor Talbot, when he was high at the bar in the year 1725; which opinion feems to have been fince adopted by (c) the

(1) Viz. flat. 5 Geo. 2. c 30. f. 7, 41.

<sup>(</sup>a) But if the bankrupt hath not obtained his certificate, and after the commission awarded, and distribution made of all the bankrupt's estate towards satisfaction of the creditors; lands, goods, &c. descend or come to the bankrupt, they shall be subject to a new sale and distribution, for the commissioners power is not fully executed, until the creditors be satisfied. Billing b. 118. but Stone 132. pl. 19, is contra.

<sup>(</sup>b) See Beawes's Lex mercat. rediviv. 499.

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legislature, who, one may presume, underflood at the time of their passing the said law, that the commissioners certificate of the bankrupt's conformity could not be invalidated after it had legally passed the great seal; and was the law to be construed otherwise, the only parties and privies to the fraudulent transaction, viz. the bankrupt and his unfair creditors might, by colluding together, ruin many innocent, honest, unsuspecting creditors, for they could have no relief under the commission, as they could not swear that the bankrupt was indebted to them, at or before the issuing of the commission, and they could not obtain a new commission, till the bankrupt had obtained his certificate under the former one; because (a) the bankrupt's effects would not vest in the new assignees, so that here would be not only a manifest failure of justice, but an unprecedented instance injustice. nounced whether the bind

However, the legislature, in order to prevent the bankrupt's obtaining any advantage from the circumstance of the commissioners certificate not being revocable, hath (b) declared that when such certificate is fraudulently obtained, such fraud may be given in evidence on the trial of the cause, wherein the bankrupt sets up the said fraudulent cer-

tificate

(a) By his for fifther and

(b) The order does not been

<sup>(</sup>a) Aik. Rep. 253.

<sup>(</sup>b) Stat. 5 Geo. 2. C. 30. f. 7, 41.

tificate in bar to an honest demand; and by this means the certificate hath its proper operation; for as on the one hand the bank-rupt cannot avail himself of it, if fraudulent, to defeat any just demand made on him, so on the other hand, if legally obtained, it shall be an irrevocable sanction to all the bank-rupt's subsequent fair transactions and deal-

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Lord chancellor (a) Appley hath defired the commissioners to (b) inquire, in case it be a fingle commission, whether the bankrupt was concerned in any and what partnership at the time of his bankruptcy? and in case the fame be a joint-commission, then to enquire of how long standing the partnership has been, and whether any separate commission has before iffued, and be then depending against either, and which, of the said partners? And that they do likewise in all cases enquire, whether the bankrupt ever, and how long before, had obtained a certificate under any former commission, or been difcharged under any act for the relief of infolvent debtors? And in case upon such inquiries they have reason to apprehend, that the bankrupt in a fingle commission has been concerned in any partnership, or that a sepa-

(a) By his lordship's order of 14th Feb. 1774.

<sup>(</sup>b) The order does not feem to afcertain the precise time when the recommended inquiry is to be made.

rate commission has before issued against either of the bankrupts in a joint-commisfion; or that the bankrupt has before obtained his certificate under a former commission, or been discharged by any act for the relief of infolvent debtors; that the commissioners do proceed upon such enquiry and hear the evidence thereon in the presence of the bankrupt, who is to be informed of the subject of the inquiry, and to be at liberty to lay evidence before them relating thereto; and in case any of the matters aforesaid do appear to them, that they do at the time of making their certificate also separately certify to his lordship such of the aforesaid matters as they find to be true. And that they transmit such separate certificate to the fecretary of bankrupts to be laid before his lordship at the same time with the other certificate.

On the examination of the commissioners of bankrupt, touching the defects of those laws, before a committee of the honourable house of commons, before whom the petition presented on the behalf of several bankrupts was referred, one of the commissioners fubmitted, that their certificate of the bankrupt's conformity, should in no case be allowed, till his affignees had declared one dividend of his estate, and the commissioner, in order to enforce such alteration in the bankrupt laws, observed, that notwithstand-

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ing the directions of 5 Geo. 2. touching the declaration of dividends, yet it rarely happened that a dividend was declared under two years, and in many cases much longer, and in some none at (a) all.

The legislature considering that the proposed alteration might tend to diffress an unfortunate bankrupt, for the wilful neglect of fraudulent assignees, declined carrying it into execution.

Modern commissioners, however, disclaiming the legislative authority, as well as the reasonableness of the objection, have prefumed to refuse certifying the bankrupt's conformity, not only until they are fatisfied the bankrupt estate will produce a dividend, but also till a dividend thereof bath been actually made.

The commissioners certificate of the bankrupt's conformity discharges him, (b) and his (c) bail.

Lord chancellor King (d) was of opinion, that separate debts are discharged by the allowance of a certificate under a joint com-

<sup>(</sup>a) The report is dated 2 June 1759, 32 Geo. 2. which fee in Com. Journ.

<sup>(</sup>b) State & Geo. 2. c. 30. f. 7, 13. but the certificate does not discharge the bankrupt's goods. Barnes 204,

<sup>(</sup>c) Barnes 104, 105.

<sup>(</sup>d) 3 Wil. Rep. 24. en preter to entered unteration in the

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mission, and lord chancellor (a) Parker said, that such certificate discharged (b) the bankrupt, not only of what he owed separately, but also of what he owed jointly and on partnership accompt; because by the act of parliament, the bankrupt, upon making a sull discovery, and obtaining his certificate, was to be discharged of all debts, and as the debts which he owed jointly with another were equally his debts as those which he owed on his separate accompt, that consequently he was to be discharged of both his joint and separate debts.

It is a discharge from an action brought against the bankrupt as a drawer of a bill of exchange, though the bill be not returned and protested for (c) non-acceptance till aster the bankruptcy, the court being of opinion, that the principal (d) was the drawing

<sup>(</sup>a) He further said, that it had been so determined by the judges of the King's Bench. 3 Wil. Rep. 24. in notes, S. P. in totidem werbis, by lord Hardwicke. Atk. Rep. 67. pl. 22. id. 138. S. P. by the court of King's Bench. 2 Stra. 1157. See Beawes's Lex mercat. rediviv. 498.

<sup>(</sup>b) And his wife too for ever. Wil. Rep. 157. 10 Mod. 246, 247. Cib. Cas. 327.

<sup>(</sup>c) It was infifted, that the cause of action arose upon the Non-acceptance and protest, which were both necessary to be averred in order to maintain the action, and the charges thereof were to be recovered a Stra. 949. 2 Kel. 239. pl. 191.

<sup>(</sup>d) 2 Stra. 949.

the bills, and therefore (a) within the (b) statutes; but Sir John Strange seems to doubt

the authority of this refolution.

The court of King's (c) Bench held, that the commissioners certificate discharged the bankrupt from a contempt in not performing an award, this being a demand for which debt would lie, and the act saying he should not be arrested, prosecuted or impleaded for any debt due before the bankruptcy, it would therefore be hard to keep him in custody, when the duty was discharged.

It will discharge him from a judgment obtained after (d) his bankruptcy on a debt due

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A certificate discharges the person of a bankrupt and his estate (e) subsequently accrued.

Where a person discharged by the insolvent debtors act, becomes bankrupt afterwards, lord *Hardwicke* said, that his certificate must be special, and that it would discharge (f) only his person.

<sup>(</sup>a) 2 Barnard, K. B. 255, 256.

<sup>(</sup>b) Stat. 7 Geo. c. 31. 5 Geo. 2. c. 30. f. 22.

<sup>(</sup>c) 2 Stra. 1152. (d) 2 Stra. 1196.

<sup>(</sup>e) But not the estate in the hands of the ass nee.

<sup>(</sup>f) Not his future estate and effects. Att. Rep. 257.

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Such certificate discharges him from rent, (a) arrear on leafe, provided that neither the possession, nor the legal interest of the estate be in him.

So it does from debt on bond, for payment of money by (b) instalments, though fome of them be not payable till after the bankruptcy, for after the first default in payment the bond is forfeited; and the penalty

is the debt (c) in law.

Bankrupt who was in cuftody on or before 25th of March 1772, for any debt due before commission issued, and who conforms to the bankrupt laws, and never was committed for contumacy or non-compliance with these laws, any judge of the court whence the process iffued against the said bankrupt, on his (d) petition, may fummons plaintiff to appear to shew cause why he should not be discharged from his imprisonment (bankrupt first making oath that debt did accrue before iffuing commission) and plaintist not

(c) Andr. 110. Bul. Ni. Pri. 138, 175. 2 Stra.

1028. Caf. Temp. Hardw. 219.

appearing,

<sup>(</sup>a) Barnes 69. (b) Barnes, 101.

<sup>(</sup>d) Application to a judge or a baron, in a fummary way, is by fummons, and to the great feal, or mafter of the rolls, by petition; it is fingular that this diftinction was not attended to by the legislature, however the practice on discharging under this very act hath always been by fammons in the usual way.

appearing, or not proving that bankrupt concealed any of his effects, or not conformed himself to the laws against (a) bankrupts, judge shall, by (b) warrant or other instrument, discharge him from imprisonment for any debt due before commission issued, and shall not be liable to be arrested for any debt due or contracted before such commisfion iffued, fubject nevertheless, in every other respect, to the laws against bankrupts (c); and if fuch bankrupt fo conforming, shall be hereafter arrested and held to bail, or taken in execution, for any debt due or accruing before the date of his commission, may after 40 days of his arrest, in like manner (d) petition any judge of the court wherein fuch process issued, who is to discharge fuch bankrupt in like manner, and on like terms and conditions, as aforefaid; and if he shall be afterwards arrested for any other debt, also accruing before his commission iffued, any judge of the court wherein the

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(a) As the laws concerning bankrupts are for as well as against them, "bankrupt laws" seems a more applicable expression than "laws against bankrupts."

(b) The same observation occurs here as we made on the word petition, for the word "warrant is peculiarly adapted to criminal and equity proceedings; order is in like manner applicable to common law.

(c) 12 Geo. 3, c. 47. f. 2. the preamble to which is, "that many bankrupts are confined in prison, notwithstanding they have delivered up all their effects."

(4) See Note (d), in the preceding page.

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process issued, upon summons of proper party, may immediately discharge such bank-

rupt (a).

Bankrupts included in stat. 12 Geo. 3. c. 47. f. 3. (b) having not as yet returned home. or not being able to act in their occupations, from some certain circumstances of their case. fuch persons, as described in 12 Geo. 3. and who have not been committed for any act of contumacy, or non-conformity, yet who have not gained a total discharge from their creditors, or their debts under their commisfions, may apply by petition or motion, to the court of Chancery, fetting forth fuch grievance and circumstance they may lie under, relative to fuch commission, which petition, &c. the court is to refer to a master; and upon report or hearing thereof, shall direct the commissioners to certify the proceeding, under the commission, and court shall make such order thereupon, for the discharge or relief of such bankrupts, as shall seem proper.

(b) 14 Geo. 3. c. 77. f. 63. being an insolvent debtor's act, and the first, wherein uncertified bank-

rupts are not excepted.

The

<sup>(</sup>a) 12 Geo. 3. c. 47. f. 3. the preamble to which is, it that bankrupts from fear of being arrested and thrown under long imprisonment, abscond and secrete themselves from their home, or go abroad into foreign parts, to the greatest distress of their families, and the detriment of the kingdom."

The bankrupt's certificate does not (a) discharge him from his bond conditioned for payment of a sum of money in case one M. L. should marry him, and should happen to survive him, because it was uncertain, whether this bond would ever become due or not, it depending upon two (b) contingencies; first, the marriage taking effect, and secondly, the wise's surviving, which had not both (c) happened at the time of the act of bankruptcy committed.

It does not discharge him from a bond of (d) indemnity, where the breach was after

the bankruptcy.

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Three (e) barons against one were of opinion, that it did not discharge a note payable a twelvemonth after date, on the drawers becoming bankrupts before it was due.

L. C. J. (f) Hardwicke said, that where there was an act of bankruptcy between the becoming bail on error, and the affirmance; the bankrupt was not discharged by his certificate from his recognizance, for that this was but a contingent debt.

(b) 2 Stra. 868.

(c) 2 Lord Raym. 1549.

(e) Bunb. 120. pl. 187.

<sup>(</sup>a) Barnard, K. B. 59. Com. Dig. 539.

<sup>(</sup>d) 2 Stra. 1160. Barnes 113. S. P. in C. B.

<sup>(</sup>f) 2 Stra. 1043. Cal. Temp. Hardw. 262.

The bankrupt's certificate will not discharge him from debts which he owes as (a) executor.

The certificate of one bankrupt partner

does not (b) discharge the other.

The allowance of a bankrupt's certificate will not discharge his (c) sureties, but they may be proceeded against notwithstanding such allowance.

Lord (d) Hardwicke faid, that it would not discharge him from a commitment on

behalf of the crown.

Lord Talbot (e) said, that notwithstanding the effects of a bankrupt in the plantations were liable to the commission here, and the right was vested in the assignees; and though it seemed reasonable that his certificate should be equally extensive as his discharge; yet as the laws of England, made since Barbadoes and the other plantations were settled, did

(b) Stat. 10 An. c. 15. f. 3.

(d) Atk. Rep. 262. pl. 143.

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<sup>(</sup>a) See Atk. Rep. 101. pl. 50. 102. pl. 51. Wil. Rep. 254. 10 Mod. 162, 163, 245. Gilb. Caf. 323.

<sup>(</sup>c) Com. Dig. 539. Atk. Rep. 84. Lord Mansfield faid, (which was agreed to by the other judges) that if the certificate was obtained before the bail were fixed, they should be discharged; but if they were fixed before the certificate was obtained, they remained liable. Bur. Rep. 245, 436.

<sup>(</sup>e) Beawer's Lex mercat. rediviv. 499. The late L. C. Ryder was of the same opinion, and for the same reasons; his opinion was figned July 1, 1738.

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not extend to them, unless they are expressly named, and as the laws relating to certificates did not expressly extend to the plantations, he was of opinion a certificate confirmed here, would be no (a) discharge to the bankrupt, if a suit was commenced against him in Barbadoes, or the other plantations.

A person previous to his bankruptcy, entered into an agreement, to refine a certain quantity of salt petre, but neglected to sulfil the same; after bankrupt had obtained his certificate, plaintiff sued him for a breach of the above contract, and having obtained a verdict against him, took him in execution.

Defendant's counsel expatiated very pathetically on the hardship of a law, which, if the present imprisonment should be deemed legal, would deprive a man of his liberty, and at the same time deprive him of every possible means of procuring it, that is, oblige him to deliver up all his estate and effects, under the penalty of death, for concealment; and afterwards confine him in goal for having done his duty in obedience to the bankrupt laws: besides, the damages, though they

could

<sup>(</sup>a) But the late Sir John Strange was of opinion, (which he figned 7 June 1738.) that unless the bank-rupt's debts in Barbadoes were secured by some mortgage or pledge, the certificate would extend to discharge them.

could not be precifely ascertained, at the time of the bankruptcy, plaintiff might, nevertheless, have proved his debt under the commission, by charging the real value of the falt petre, both in respect of quantity, as well as quality; and therefore moved, that the rule to shew cause why the defendant should not be discharged out of custody, might be made absolute; at the same time fubmitting to the court, whether it would not be better to release the party, the point of law being by no means clear, than continue the defendant in prison, and thereby gratify unrelenting resentment.

Plaintiff's counsel contended, that the cause of action, for which the defendant was detained in execution, did not, nor could posfibly arise till after the bankruptcy, the time specified in the contract for refining, being a reasonable time, and consequently to be determined at the option of the plaintiff; that supposing it had been otherwise, the defendant's promife, fo late as on his last examination, " that he would fend the falt-petre back refined," removed every doubt that could possibly exist; and that in fact it appeared on the trial, that the defendant could not return the falt-petre, either refined or unrefined, having previously disposed of a considerable

part thereof.

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Lord Mansfield (a) observed, with defendant's counsel, that, in his opinion, the bank-rupt laws had done more harm than good; but such as they were, the court was bound by them, and mankind must now submit to them, and in all probability would be so obliged; and he must be of opinion, that under the present circumstances the defendant had no legal remedy or redress, nor any thing savourable to expect, but from the lenity and mercy of his creditor.

#### CHAP. VIII.

#### The Dividend.

THE (b) commissioners after (c) the expiration of four months, and within twelve months from the time of issuing the commission,

(a) Michaelmas Term, 14 Geo. 3. 1773. B. R. Anon. MSS. Notes.

(b) The affignees having refused to make a dividend, lord Hardwicke ordered, they should attend the commissioners at a fitting to be appointed by them for that purpose, and that if the commissioners thought it proper for the affignees to make a dividend, that it should be advertized accordingly. Atk. Rep. 91. pl. 39.

(c) Though till the four months are passed the commissioners cannot make distribution, yet they may sell

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commission, (twenty one days notice having been previously given in the Gazette, of the time and place they and the (a) affignees intend to (b) meet to make a dividend) thall order such part of the neat produce of the bankrupt's estate in the hands of the assignees, as they shall think fit, to be divided amongst the creditors, and shall make such order for a dividend in writing, and shall cause one part of such order to be filed amongst the proceedings under the commis-

and prepare for a diffribution presently upon execution of the commission, within the four months; so refolved in Hut. Rep. 38. Lord Hardwicke faid, an attempt to make the court judges in what manner the estate and effects of a bankrupt should be distributed before the expiration of four months from the date of the commission, was an attempt absolutely to change the method chalked out by the act, and ought to meet with the utmost discouragement. Atk. Rep. 107.

(a) Upon every such meeting, the assignees shall produce accompts of their receipts and payments, &c. of what shall remain out standing, and shall (if the creditors present require the same) be examined upon oath, or folemn affirmation, touching the truth of such accompts; and the affignees shall be allowed all just al-

lowances. Stat. 5 Geo. 2. c. 30. f. 33.
(b) At which time the creditors, who have not before proved their debts, shall be at liberty to prove the fame; which meeting for the city of London, and all places within the bills of mortality, shall be at Guildball. Stat. 5 Geo. 2. C. 30. 1. 33. 11 busid on ron idea

e affair with the commission, to which he is only a

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fion, and shall deliver unto each of the affignees a duplicate of fuch (a) order (b).

Upon the common equity of the court of chancery, if creditors will make an affidavit that they have not read the Gazette, they will be admitted, fo as not to disturb the former dividend, and by that means must, in the first place, be brought up equal to the creditors under the former dividend, before the commissioners can proceed to make a fecond; by lord (c) Hardwicke.

Within eighteen months after iffuing the commission, the commissioners shall make a fecond dividend, in case the estate was not wholly divided upon the first, and shall cause notice to be inferted in the Gazette, of the time and place they intend to meet to make a second dividend, and for the creditors,

<sup>(</sup>a) Which order shall contain an account of the time and place of making fuch order, and the fum total of the debts proved, and the fum total of the money remaining in the hands of the affignees, and how much in the pound is then ordered to be paid; and the alfignees in pursuance of such order, and without any deed of distribution, shall forthwith make such dividend, and take receipts in a book from each creditor. Stat. 5 Geo. 2. c. 30. f. 33. An affignee cannot ftop a person's share in a dividend on account of his own private debt, owing to him from that person, for he ought not to blend (faid lord Hardwicke) his own private affairs with the commission, to which he is only a truftee. Atk. Rep. 91.

<sup>(</sup>b) Stat. 5 Geo. 2. c. 30. f. 33.

<sup>(</sup>c) Atk. Rep. 209.

who shall not before have proved their debts, to come and prove the same; and at such meeting every assignee shall produce upon oath or affirmation his (a) accompts, and what upon the balance shall appear to be in his hands, shall by like order of the commissioners be forthwith divided, which second dividend shall be final, unless any suit shall be depending, or any part of the estate standing out, or unless some future (b) estate of the bankrupt's shall afterwards come to the assignees, in which case, the assignees shall, as soon as may be, convert such future estate

(a) We have observed a subsequent bill to that settled at the second sitting usually an item in this accompt, but it very seldom appears to have been taxed, without which we apprehend the commissioners ought not to look upon it as a just allowance, because to the end that commissions of bankrupt may be carried on and prosecuted with as little expense as reasonably may be, all bills of sees or disbursements claimed or demanded by any solicitor, clerk or attorney employed under any commission of bankrupt, shall be settled, adjusted, and certified by one of the masters of chancery, and so much as the master shall certify to be due to such solicitor, Sc. and no more, shall be paid by the offigues under the commission. Stat. 5 Geo. 2. c. 30. s.

(b) It feems that the word of future?" should be expunged, for lord Hardwicke said, if a hankrupt after his discharge got future effects, in point of justice and conscience he ought to make good the desciency, though no court of equity would do it for the creditor. Atk. Rep. 256. See id. 79. & stat. 5 Geo. 2. c. 30.

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into money, and shall, within two months after, by the like order of the commissioners, divide the same (a).

#### H A P. IX. C

The Bankrupt's Allowance, and herein of the Overplus.

LL bankrupts (a) who furrender and conform, shall be allowed five per cent. out of the neat produce of their estates, in case the same, after such allowance made, be sufficient to pay ten shillings in the pound; fo as the faid five per cent. do not exceed 200 l. And if fuch neat produce, after the allowance, be fufficient to pay twelve shillings and fix pence in the pound, then fuch bankrupts are to be allowed feven pounds ten shillings per cent. so as such allowance does not exceed 250 /. And in case the neat produce, over and above such allowance, pay fifteen shillings in the pound, then such bankrupts shall be allowed ten per cent. so as the same do not exceed 3001. If (c) the near

conference he organt to make good the deficiency. (a) Stat, 5 Geo. 2. c. 30. f. 37.

<sup>(</sup>b) Stat. 5 Geo. 2. c. 30. f 7.

<sup>(</sup>c) Stat. 5 Geo. 2. c. 30. f. 8.

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produce of the bankrupt's estate shall not amount to ten shillings in the pound, he shall be allowed so much as the assignees and commissioners shall think sit, not (a) exceed-

ing three pounds per centum.

Lord (b) Hardwicke was of opinion, on the construction of this clause of the act of parliament, that though the bankrupt did furrender and conform, yet that he was not intitled to the allowance given to bankrupts, unless he had obtained his certificate, for if the creditors should consent to giving it him before, it would be of no service, as they might take it from him again the next moment, for it would be liable in his hands to fatisfy any creditors, till he was entirely cleared by the certificate; and he further faid, that till after a final dividend, it could not be feen whether the bankrupt would be entitled to any allowance at all, for the act of parliament directed that the neat produce of his estate should be sufficient to pay the creditors of the bankrupt, who had proved their debts under the commission the sum of

Danke

<sup>(</sup>a) As this clause of the statute has not the words over and above such allowance," and as it does not limit the allowance to any particular sum, it seems that a bankrupt who pays only 9 s. 9 d. in the pound may be entitled to a larger allowance than one who pays even 15s. in the pound; for the latter cannot receive more than 300 l. whereas the former may near 500 l.

(b) Atk. Rep. 208.

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244. ten ten shillings in the pound, over and above such

Lord (a) Hardwicke ordered an affignee of a bankrupt's estate out of the effects in his hands to pay his administrator the allowance under the act of parliament at the rate of 51. per cent. upon the money got in from the bankrupt's estate, not exceeding the sum of 200 l. the bankrupt in his life-time having made a neat dividend of ten shillings in the

pound.

The commissioners shall, upon lawful request to them made by the bankrupt, not (b) only make a true declaration to him of the employing and bestowing his lands, tenements, hereditaments, offices, fees, goods, wares, money, chattels, and debts paid and fatisfied to his creditors; but also make payment of the (c) overplus of the same, if any fuch shall be, to the said bankrupt, his executors, administrators, or affigns; and the

(a) Aik. Rep. 209. pl. 114, 208. pl. 212. 3 Aik. (b) Stat. 13 El c. 7. f. 4.

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<sup>(</sup>c) Lord Hardwicke faid, that the furplus to be paid over to the bankrupt was only the furplus after payment of the whole debts; for it would be vain to pay any other furplus, when it might be recovered from him again by the creditors. Atk. Rep. 78. In case of a surplus lest after payment of every debt, interest shall again revive, and be chargeable on the bankrupt or his representative. 2 Black. Com. 488. Ark. Rep. 244. pl.

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bankrupt, after full fatisfaction of his creditors, shall have full power and authority to recover and receive the residue and remainder of the debts (a) to him owing.

(a) Stat. I Jac. c. 15. f. 15. lord Hardwicke directed, that a bankrupt who had paid 14s. and 6 d. in the pound, who had his certificate, and a release from his creditors of all further demands, should stand in the place of the assignees to get in the remainder of the debts, on giving a proper indemnity to the assignees, that they might not be called to an account for such money so received. Atk. Rep. 145. pl. 84.

CONDING to observe the same method in a parched and parketing many are in the theory, we will lay with a latter of the contract of the contrac

Acts of Bankrupter,

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be has any reason to suspect, that a commission of Bankrupt will be taken out against mind be rasy truet a Cover un the secretary's offices in order

to prevent the fame iffuing a out-lord Harrachte (a) declared his disapprobation of Cavear, becaute they gave as opportunity to reifons, against whom:

connections were to be taken out, to make away

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## APPENDIX

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### PRECEDENTS.

INTENDING to observe the same method in this practical part, as in the theory, we will lay before the solicitor approved precedents of

1. Trading.

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- 2. Acts of Bankruptcy.
- 3. Debts of the petitioning Creditor.

But previous to this, we beg leave just to mention Caveats and Doquets. As to the first; if a perfon has any reason to suspect that a commission of Bankrupt will be taken out against him, he may enter a Caveat in the secretary's office, in order to prevent the same issuing; but lord Hardwicke (a) declared his disapprobation of Caveats, because they gave an opportunity to persons, against whom commissions were to be taken out, to make away with their effects.

<sup>(</sup>a) Ath. Rep. 72. 73.

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As to the fecond; lord chancellor Appley hath (a) declared that a Docquet (b) being ftruck, and no commission issued thereon, shall in no case prevent the issuing of a commission, on the petition of any other creditor, to as such second application be not made in less four days after such Docquet struck, exclusive of the day of striking the same any former (4) practice to the contrary, notwithstanding.

### 1. (d) Trading.

All witnesses must sign and swear to the truth of their depositions or proofs of trading. See fol. 298. 320.

#### (e) Banker.

At Serle's (f) coffee house, Lincoln's-Inn, in the county of Middlefex .- June 1768.

" Z. A. of, &c. being (g) fworn Thomas Nugent. " and examined the day and , " year, and at the place above-" mentioned,

(a) By order of 14 Feb. 1774.

(b) Which is done by a creditor of the intended bankrupt, his makng the usual affidavit of his debt, and executing the common bond to

(e) Which was, that the creditor, who had fruck the Docquet was not obliged to proceed any further, unless another creditor applied for 4 commission; in which case, the creditor's solicitor, who had struck the Decquet, received notice, that unless he sealed his commission forthwith, the commission would issue on the second creditor's applie cation.

(d) See fol. 2. to 230. (f) The place where the commissioners meet to open the commisfion; this meeting may be wherever the parties concerned think proper,

(g) If the examinant happens to be a quaker, this deposition must run thus; "Z. A. of &c. being one of the people called quakers,

mentioned, before the major part of the com-" miffioners named and authorized in and by a com-" mission of bankrupt awarded and issued, and " now in profecution against Francis Gibbons of, " &c. upon his oath faith, that he hath known the faid Francis Gibbons for John Fensbawe, " the space of twelve months now last past, during (a) which " time the faid Francis Gibbons did use and exer-" cife the trade and bufiness of a banker, and as " fuch was intrusted with the money, goods, and " effects belonging to other persons (b), and mer-" chandized therewith; and fought and endeavour-" ed to get his living thereby, as others of the fame " trade and bufiness usually " do." Champion Branfil.

#### Pawnbroker (c).

#### At, &c.

Thomas Nugent. "Y. X. of, &c. being sworn and "examined the day and year, "and at the place abovementioned, before the major part of the commissioners named and authorized in and by a commission of bankrupt awarded and issued, and now in prosecution a- gainst Francis Gibbons of, &c. upon his oath saith,

being affirmed and examined on the day and year, and at the place abovementioned, upon his folern Affirmation faith, &cc." [eles is get on as above.]

(a) It is not necessary that the party should have traded for any particular length of time.

(b) "And did draw and re-draw bills of exchange, and discounted promifory notes, bills of exchange, &c. may be added, if the fast will support it.

(c) See fol. 13.

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" that

" that the said Francis Gibbons (or the said bank-" rupt) did exercise and carry on John Fershawe. "the trade and business of a "pawnbroker, and as fuch received goods and effects by way of pawn or of pledge, and lent monies thereon, and hath fo " done, to this examinant's knowledge, for the fpace of two years and upwards now last past, " and did feek and endeavour to get his livelihood " thereby, in the same manner, as others of that " trade and business usually do" Champion Branfil.

#### Merchant (a).

At, &c. Thomas Nugent. "W. S. of, ac. de day and year, and examined the day and year, before, &c. upand at the place abovementioned, before, &c. upon his oath faith, that he hath known Francis "Gibbons, of, &c. against whom the commission of bankrupt now in prosecution, is awarded and issued, for these three years last past, during which time he did use " and exercise the business of a John Fenshawe. "Merchant, and did trade from this kingdom of England, to New England " beyond the feas, and did buy cloths, stuffs, " British linen, and other things in exchange of for fuch cloths and other things, and did feek " and endeavour to ger his living thereby, as to about ont best other merchants usually do." Champion Branfil ud yd rofted 30 swednes W. S. (a) See fol. 3. Or Or

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(a) See (b) Cr (c) Sec

## or, thus,

Thomas Nugent. "During which time he car-

" chant at his house fituate, &c.

John Fenshawe. " by exporting and importing di-

" vers and fundry kind of wares, goods, and merchandizes, and

Champion Branfil. " fought, &c."

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#### Exchange (a) Broker.

#### At, &c.

Thomas Nugent. " M. O. of, &c. [as before to]

"during which time he carried on and exercised the trade

" and business of a broker in

" buying and felling (b) flock

John Fenshawe. " by commission, and procuring

" infurances on thips and car-

" goes for lucre and gain, and fought and endeavoured to get

" his livelihood thereby, as others

Champion Branfil." of the same trade and business are used to do." M. O.

#### (c) Factor.

## At, &c.

ob pliante sin the and exercised the trade of a

John Fenshawe. " factor by buying and felling

(a) See fol. 5.

(b) Cr fuch other bufiness as they generally transact.

(c) See fol. 5. 13.

and did trade, on

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#### Depositions of Trading.

" goods by commission, and

" fought, and endeavoured to get

Champian Branfil. " his living thereby, as others of " the fame trade usually do."

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st caring which time he uted " er safet Aand carried on the trade and cofinefs of a thos-

Thomas Nugent. " A. T. of, &c. [as before to] mayono bas que during which time he carri-

a sood soon off ed on the trade or profession sailed bus sent of a scrivener, and as such re-

an bestion of ded ceived other men's monies

and bishorois at and estates into his trust and John Fenshawe. " custody, and make merchan-

" dize thereof, and fought and

" endeavoured to get his living

" thereby, in the same manner

" as others of that profession are Champion Branfil. " used to do." A. T.

Tiomas Nugent. . " D. C. dur Tyloth tec [as before ro]

the grade of a taylor in buying with filk, liner, buck-

Thomas Nugent. of Sc. [as before to]

of new emel during which time he exer
of new emel during which time he exer
of new emel cifed the trade or business of

an holier in buying and selling

Fohn Fenshowe. Thockings and gloves, and

fought and endeavoured to get

whis living thereby as others of

the same trade are used to

Champion Branfil. " do."

1 Joi 2. S.

( ) See fol, 15.

Shoemaker.

## and eavoured to get to

At, Sc.

Thomas Nugent.

the de

" N. O. of, &c. [as before to] " during which time he used

" exercised and carried on the

" trade and business of a shoe-" maker, by buying of leather

John Fenshawe. " and working up and convertcollisions to al" ing the fame into shoes, boots,

and splatterdashes, and selling

the fame, when fo worked up

hor, flust aid of and converted as aforefaid, and

Champion Branfil. " fought, &c. [as above."] N. O. dine thereof, and fought and

Taylor (0).

Ac See 3A first profession are

Thomas Nugent.

" D. C. of, &c. [as before to] " during which time he used

sanging Erangl se

" the trade of a taylor in buy-" ing cloth, filk, linen, buck-

John Fenshawe.

" ram, and other materials, and " making them up into cloaths,

exe and selling the same when so o slaudud to comade up, and fought, and en-

gailed bas gai deavoured to get his living "thereby, as others in that trade

gloves, Champion Branfile are wont to do."

D. C.

et the same trade are used to Champion Branfil " uo."

(a) See fol. 6.

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If the solicitor should happen to find it difficult, to particularize the trade of the party; he may denominate him a "Dealer and Chapman," for this general description, it is said, will include all traders, a "Chapman" being one who buys and sells any (a) thing.

These depositions, we presume, will be sufficient for the practifing solicitor to frame the description

of any other trade whatever.

## 2. Acts of Bankruptcy.

All depositions of acts of bankruptcy must be figned and sworn to be true, by the witnesses produced to prove them.

#### Keeping (b) House.

#### At, &c.

Thomas Nugent. "O. N. of, &c. one of the fervants of Francis Gibbons of &c. the person against whom the commission of bankrupt now in prosecution, is awarded and isfued, being sworn and examined on the day and year, and at the place abovementioned, before the major part of the commissioners, in and by the faid commission named and authorized, upon his oath saith, that on Saturday morning last, the said Francis Gibbons gave orders to this examinant to deny his being at home, in case any of his creditors should come to his house to enquire

(b) See fol. 37.

(6) See fel, az

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(a) (b)

<sup>(</sup>a) 2 Black. Com. 476.

" for him; and that after this examinant had re-" received fuch directions from his faid mafter, " one Mr. T. about eleven of the John Fenhawe. " clock of the same morning, vam and ware " came to his mafter's house and " equired of this examinant for the faid Francis "Gibbons, and told this examinant that he came " for money due from the faid Francis Gibbons, to " him the faid T. but this examinant denied his be-" ing at home, and refused to let the said Mr. T. " fee the faid Francis Gibbons, (who was then above " flairs in his chamber, as this examinant believes) " pursuant to the order and direction by him this " examinant received from the faid Francis Gibbons, " this examinant at the fame time knowing that " the faid Mr. T. was a (a) cre-Champion Branfil. " ditor of the faid Francis Gibbons."

#### Taking (b) Sanchuary.

#### At, &c.

Thomas Nugent. "T. W. of, &c. being sworn "and examined on the day and "year, and at the place abovementioned, before, "&c. upon his oath saith, that Francis Gibbons, the person against whom the commission of bank-"rupt now in prosecution is awarded and issued, did within the space of three months now last past take an apartment or lodgings in Scotland-"Yard in the city and liberty of Westminster, for the purpose of screening himself from his cre"ditors, as this examinant verifohn Fenshawe. "ly believes, because the said "Francis Gibbons declared to this

(b) See fol. 42.

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<sup>(</sup>a) See fol. 39. Note (a).

bished the major pale of the place above-mentioned, be for the major pale of the community of the safety of the sa

can slash (a) guillowd eid mort guirnos dout the day of late part, and met the faic transit & blomos are which time to the laid francis & bloms declared so this exami-

Thomas Nugent. A. B. of &c. Fas in the last mon departed from control the fame shooding nitis breathing a letter of exa tain agnighola sid no ou his affairs, if the ob olle bas a ofereminant's house, and usual place seed leaverall days of habitation of for deverall days etils as erenes doube now laft paft, and from the imaxo azidtet didw stuostib inem, that then he, John Fenfhawe. s nant hath had with the faid firmin aid to findes Francis Gibbons, and as this exradaria ansaims aminant verily believes, he doth did then I bint er fecrete himfelf from his credi--imaxe end of best fors, for fear of being arrefted to snorro temolinocamento by the bankrupe of bankrupe Champion Branfilliss them for debt. 361 ad blood " .B. Aot appear thereto; and when this examinant " faw him left, whichthin examinant believes to last past; be on or about the day of " the faid Francis Comma Acclared to this examimos non bluew ereditors with the day fine wom work of the day and the hear from him till with the hear from him till the 
(a) See fol. 44.

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vear, and at the place above-mentioned, be-" fore the major part of the commissioners named sand authorized, loinoland by a commission of " bankrupt awarded and iffued, and now in pro-"fecution against Francis Gibbens of, &c. upon this oath faith, that the faid Francis Gibbons through misfortunes in trade, being rendered incapable to pay all his creditors their full and "juft demands, did fend this examinant up to London, to endeavour to compromise his affairs " with his creditors, and accordingly this exami-" nant did come up to London, on or about the last past, and met the day of " faid Francis Gibbons at Edmonton, at which time " the faid Francis Gibbons declared to this exami-" nant, that he was unwilling and atraid to meet "his creditors; and that on or about the fame "time, he gave him this examinant a letter of " attorney to make an end of his affairs, if the " creditors would confent thereto; and also de-" clared to this examinant, that if his faid credi-" tors would not comply with fuch terms as this " examinant should propose to them, that then he, "this examinant, should act and transact his afexe side as bus and fairs for the best of his interest; John Fenthawe. " and this examinant further bero aid mort if faith, that the faid Francis Gibbons hath feveral times declared to this exami-" nant, o that dim case any statute of bankrupt " fhould be taken out against him, that he would not appear thereto; and when this examinant " faw him laft, which this examinant believes to " be on or about the day of laft paft. " the faid Francis Gibbons declared to this examianant, that in case his creditors would not comply with the proposals he had power to make them, that they should not hear from him till 05

(a) Sec fel 14

" next, and believes that nobody either in Lon. " don, or, &c. knows where he is gone, and this " examinant further faith, that he hath perused the " three paper writings, produced to this exami-" nant, marked respectively A. B. G. hereunto annexed, and faith, that he, this examinant, well " knows his brother's hand-writing, and that " the names and letters Francis Gibbons to the " faid three paper writings, respectively sub-" fcribed, are of the proper hand-writing of the " faid Francis Gibbons, the person Champion Branfil. " against whom the commission " is awarded." W.G.

#### Making a fraudulent (a) grant. and examined the day and

## " year, and at the place the overmentioned, lefter

namas Nugent. "P. R. of, &c. being sworn

and examined on the day and

" year, and at the place abovementioned, before, &c. upon his oath faith, that he was present and did fee Francis Gibbons of, &c. the person against " whom the commission of bankrupt, now in pro-" fecution, is awarded and iffued, duly fign, feal, and as his act and deed deliver, a certain in-" denture [here fet forth a fort recital of the material of parts of it] and this examinant further faith, that the name Francis Gibbons Subscribed [or

" Mark fet] against the seal of John Fenshaws. " the faid indenture, (now pro-" duced by him this examinant,

" at the time of this his examination, and exhi-

(a) See fol. 18 man de vo bathaton in grapad !!

Thomas Nugent.

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bited (a) to the major part of the commissioners in and by the said commission named and authorized) is the proper hand-writing of [or made by] the said Francis Gibbons, and this examinant further saith, that the name of this examinant fubscribed to the said indenture as a witness to the execution thereof, is of Champion Bransil. it this examinant's own proper hand-writing. P. R.

### Obtaining an illegal (b) protection.

#### At, &c.

" S. M. of &c. being fworn Thomas Nugent. " and examined the day and " year, and at the place above-mentioned, before " the major part of the commissioners named " and authorized in and by the commission of " bankrupt, awarded and iffued, and now in pro-" secution, against Francis Gibbons of, &c. upon " his oath faith, that the faid Francis Gibbons is " protected (c) by ambaffador u to he this examinant " having feen the faid protection under the hand " and feal of the faid ambaffador, in the poffeffion " of the faid Francis Gibbons, And this exami-" nant further faith, that he verily believes that

(a) The form of the exhibit is thus,

Exhibited to us this day of June 1768, in a commission of bankrupt against Francis Gibbons.

desiment in and A Thomas Nugent, and some champion Brashl.

(b) See fol. 54.
(c) If the party is protected by a peer or member of parliament, the deposition must be varied accordingly.

on of the faid Erancis Gibbens presured the faid protection bright bright for the purpose of screening himself from his creditors, and to prevent his being arrefted things noith polore of why them for debt, because he bus John Fensbawe. "this examinant on or about the dies sid noque benout fifth day of March now last past, was present and in company with the said Francis Gibbons and William (a) Whiteker (whom " this examinant was credibly informed is one of the officers belonging to the theriff of Middlefex, v office v which information this examinant verily believes to be true) who told the faid Francis Gibbons that he had a warrant to arrest him the faid Francis Gibbons at the fuit of James Taylor, for 500 L debt, whereupon the faid Francis "Gibbans produced his faid protection to the faid William Whitaker and claimed privilege by virtue thereof, and bade the faid William Whitaker to arrest him at his peril, which the faid William " Whitaker declined to do, on account of the faid protection, as this examinant Champion Branfil. " believes for the reasons afore-", bis commit him to the cuffody". S. M.

# Lying in (b) prifor two months.

#### At, &c.

Thomas Nugent. "W. W. of, &c. officer to the theriff of Middlefex, being

(a) It may be prudent, and indeed perhaps thought absolutely neceffry that the officer should join in this deposition in order to commotorate the circumstances relating to the arrest, as its feems not to
be the best evidence that the nature of the case will admit of, for
what a third person said is no evidence, where that third person
himself may be had. See Theo. Evid. 110, 111. Gilb. Evid. 152.

Tri. per Paris 422.

(b) See fol. 55.

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worn and examined the day, &c. before the mamon stojor part of the commissioners named and authoblock rized in and by a commission of bankrupt awardof sleed and iffued, and now in profecution against Francis Gibbons of, &c. on the day and year, and at the place above mentioned, upon his oath faith, that on the dis land day of laft, he this examinant arrefted the faid Froncis Gibbons by virtue of [name the writ] and detained him in his custody John Fenshaws. " until the next following, " when he, this examinant, in obedience to his " majesty's writ of babeas corpus cum causa directed to the theriff of Middlefex, did conduct the body of the faid Francis Gibbons before Sir Edward "Chive, knight, one of the king's justices of the bench, at his house in Great Ormand Street, in the faid county of Middlefex, according to the command of the faid writ, which faid justice did then and there receive from him, this examimant, the body of the faid Francis Gibbons, and " did commit him to the cuftody Champion Branfil. " of the warden of the Fleet.

W.W.

### 22 At, &c.

Lying . in (b) prijon two months.

Thomas Nugent. "D. H. of, &c. gentleman, who executes the office of clerk of the papers of (a) the Fleet Prison for John Eyles, Esq. warden of the said prison, being worn and examined the day, year, and at the place above mentioned, before, &c. upon his

(a) Or the King's Bench Prifor, for Berjamin Thomas, Efg. marshal of the said prison. oath faith, that Francis Gibbons, the person (as " this deponent is informed and believes) against " whom the commission of bankrupt now in pro-" fecution is awarded and iffued, was on the last, committed to his es day of es majesty's prison of the Fleet, by the honourable 66 Sir Edward Clive, knight, one of the justices of "his majesty's court of Common Pleas at Westmin-" fler, upon a writ of habeas corpus cum caufa, di-" recled to the theriff of Middlesex, who certified " and returned to the faid writ, that the faid Francis Gibbons, in the faid writ named, was on the day of in the of his present majesty's reign, taken and detained es by him the faid theriff, by virtue of a writ of " [name the writ] to answer John Fenshawe. " [ name the plaintiff in writ] of " a plea of trespals upon the case to the damage of the said [the plaintiff] of 1200 l. which faid Francis Gibbons fo taken and detained as aforefaid, is, as this examinant is inso formed and believes, the fame person against whom the aforefaid commission is awarded: and " this examinant farther faith, that the faid Francis Gibbons hath, ever fince the day of his faid commitment to the prison of the Fleet aforesaid, " remained and continued a prisoner therein, at " the fuit of the faid [the plaintiff] and now is a " prisoner there, charged in man-Champion Branfil. " ner as aforesaid."

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We believe modern commissioners admit the certificate of the clerk of the papers, accompanied with a deposition of seeing it signed by him, sufficient proof of the arrest and imprisonment, and do not require the officer's evidence at all; as we cannot think that the modern practice is by any means satis-

fatisfactory, for the reasons given in fol. 276. Note
(a); we decline making such certificate and depofition precedents.

### Member of (a) parliament.

" con you is awarded and iffeed, was on the

# conflue and to an At, &c.

" Gyles Simson of the city of Thomas Nugent. " London, merchant, and John " Cox of Lincoln's-Inn, in the county of Middlefex, " gentleman, being feverally fworn and examined, " the day and year, and at the place above-men-" tioned, before the major part of the commif-" fioners named and authorized in and by a com-" mission of bankrupt awarded and issued, and now " in profecution against Francis Gibbons of, &c. " upon their respective oaths say; and first this " examinant Gyles Simpson for himself saith, that on or about the day of " now last past, he this examinant by virtue of an " act of parliament made and passed in the fourth " year of the reign of his present majesty king " George the Third, intituled, " An Act for pre-" venting inconveniencies arifing in cases of mer-" chants, and fuch other persons as are within the " description of the statutes relating to bankrupts, " being intitled to the privilege of parliament, " and becoming insolvent," did make an affidavit in his majesty's court of King's Bench at West-" minster, that the said Francis Gibbons was justly "indebted unto him, the exami-John Fenshawe. " nant in the fum of five bun-" dred pounds, and that the faid " Francis Gibbons, was, as this examinant verily

<sup>(</sup>a) See fol. 65.

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believed, a trader within the description of the Statutes relating to bankrupts. And this examinant further fauh, that the faid Francis Gibbons " hath not paid, secured, or compounded the said debt, or entered into any bond to pay fuch fum as should be recovered in the action, in pursu-" ance of, and according to the directions of the " faid act of parliament, to the knowledge or be-" lief of this examinant. And this examinant or John Coxe for himself faith, that he did on the day of " record in the faid court of King's Bench the faid M affidavit fo (worn by the faid other examinant "Gyles Simpson as aforesaid. And that he did on stithe (4) inenogeb day of beidebut at fue out of stathe fame court of King's Bench a fummonce Magainst the faid Francis Gibbons, and on the next stiday, being the seam day of a now last Champion Branfil. " Gibbons personally with a copy . thereof." 25 Gyles Simfon.

In our fearch after precedents of acts of bankruptcy, we met with the following extraordinary one, viz. "Deposition of an act of bankruptcy, as concerted by the bankrupt himself." Such a bankruptcy as this would (as my lord (a) Hardwicke well expressed it) be turning the edge of the law against creditors in favour of bankrupts, which was not (continued his lordship) to be suffered in a commercial country.

The above forms may be thought sufficient to enable the solicitor to draw a proper deposition, on any other act of bankruptcy; who is desired to observe that though we have all along made the

cued at [some country place] aforefald, or within ten miles of the time, and not within torty miles of London. 78 And he names of the commissioners are to be inserted at the bottom. 28 And his names of gnibar he delete of row petitioning creditors must be 150 h or three

otnu 35

trading and act of bankruptcy diffinct depolitions, yet they may be, and indeed generally are, in the knowledge of one and the fame person. 301 disd. 22 nio any coco co-pay

# 3. Debts of the petitioning Creditor.

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he action, in pur s

#### And this examinant lief of this exeminant. Affidavit (a) of one petitioning creditor's debt.

Charles Jones of High Holborn, in the county of Middlefen, mercer, maketh oath and faith, that Francis Gibbons, of the city of London, merchant, is indebted to this deponent (b) in the " fum of 100% and upwards, and that the faid Francis Gibbons is become bankrupt within some or one of the statutes made and now in force " concerning bankrupts, as this deponent is in-

" formed and believes (c)." Charles Jones.

Sworn, &cc.

### Affidavit of several (d) petitioning creditors.

" A. B. of, &c. C. D. of, &c. E. F. of, &c. " G. H. of, &c. severally make oath and say, and first this deponent A. B. for himself faith, that Prancis Gibbons, of, &c. is justly indebted

(a) All affidavits are to be ingroffed on a treble fix-penny flamp be fuffered in of (gidling) facet of paper. Stat. 5 Will. & Mar. c. 21. f. 3. 9 & 10 Wall. 3. c. 25. f. 28. 32 Geo. 2. c. 35. f. 2.

(b) If in partnership; and to Thomas Franks, Jones John, Acc.

this deponent partners in trade.

(c) If for a country commission; you add, " And this deponent further faith, that the commission, when obtained, will be eat ecuted at [some country place] aforesaid, or within ten miles of the fame, and not within forty miles of London." And the names of the commissioners are to be inserted at the bottom.

(d) The debt of two petitioning creditors must be 150 % or there

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unto him this deponent in the fum of thirty pounds. And this deponent C. D. for himself faith, that, (a) &c. [as before] and all thefe deponents fay, that they verily believe that the faid Francis Gibbons is become bankrupt within the " true intent and meaning of some or one of the " ftatutes made and now in force concerning bank-" rupts." A A A. B. E.F.All (b) fworn, &c. C. D. G. H. in the clerk i

### The Affirmation of a Quaker.

"Thomas Dunn of, &c. being one of the people called (c) quakers, upon his folemn affitmation of the word "deponent" the word "affirmant" is made use of ].

If the petitioning creditor refides altogether in the country, he must make an affidavit before a master extraordinary there, to be filed in the se-cretary of bankrupt's office in London, and exhibited (d) to the commissioners at their first meeting.

The affidavit of petitioning creditor's debt being drawn, engroffed on a treble (e) fix-penny stamped theet of paper, and sworn before a master in Chan-

(a) These petitioning creditors debts must amount all together to 200 1

(b) Sir Joseph Fekyll, mafter of the rolls, adjudged an answer of (b) Sir Joseph Fekyll, master of the rolls, adjudged an aniwer of two defendants irregular, and supplied it, because the Jarat was underwritten sworn only, not both sworn. Moseley 238. pl. 130.

(c) A quaker's affirmation was rejected, because the words "being one of the people called Quakers," was omitted.

(d) For the form of the exhibit, see fol, 295. Note (as. (e) By stat. 5 Wil. & Mar. c. 21. st. 3. 9 & 10 W. 3 c. 25. st. 28. 32 Geo. 2. c. 35. st. 2.

28. 32 Geo. 2. c. 35. f. 2. At. Pat. 2, C. C.

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Chancery Lane, or at his own house; he must enter into a bond to the Great Seal, in the penalty of (b) 200 L conditioned to substantiate his debt, and to prove the party bankrupt; this bond is usually filled up and executed at the secretary of bankrupt's (c) office, which is now up two pair of stairs, right hand door, No. 7. Lincoln's Inn New Square; but notwithstanding this usage, we apprehend that the right of preparing this bond is in the clerk to the commission.

The Creditor's (d) Bond to the Great Seal, on petitioning for a commission of bankrupt.

" KNOW all men by these presents, that I

" Charles Jones of, &c. am held and firmly bound to Charles lord Camden, baron of

" Camden Place, in the county of Kent, lord

" high chancellor of Great Britain, in 200 L

" of good and lawful money of the faid king-

"dom, to be paid to the faid lord chancellor,

or his certain attorney, his executors, ad-

ministrators or affigns; which payment well and truly to be made, I bind myself, my

(a) The hours of attendance are from 11 o'clock in the morning, to one in the afternoon, and from five in the afternoon to eight in the evening, all the year, except in Trinity vacation, when attendance is given only on Mondays, Wednesdays, and Fridays, from 11 in the morning, till one in the afternoon.

(b) We believe it has been determined that a bankrupt may bring a special action upon his case, and may recover beyond this penalty.

See Styl. Rep. 2. Wilf. Rep. C. B. 145.

(c) The hours of attendance are from nine o'clock in the morning, to one in the afternoon, and from four o'clock in the afternoon, to eight in the evening, both in term time and vacation.

(d) Which must be engrossed on a single 2 s. 6 d. stamped sheet of paper. By stat. 5 W. & M. c. 21. s. 9 & 10 W. 3. c. 23. s. 20. 12 An. stat. 2, c. 9. s. 21. 30 Geo. 2. c. 19. s. 1.

ce heirs,

and fe heirs, executors and administrators, firmly and fe by these presents, sealed with my seal, dated and the these with an of the seal 
seign lord George the third, by the grace of the Gody of Great Britain, France and Ireland, king, defender of the faith, &c. and in the

od & year of our Lord 1768. That and the salar

run, for the damages by him fulfained a and

The condition of this obligation is such, that if the above bounden Charles Jones shall prove, " as well before the major part of the commissioners to be appointed in a commission of bankrupt, " against Francis Gibbons of, &c. as upon a trial at " law, in case the due issuing forth of the said commiffion hall be contested and tried, that the faid " Francis Gibbons stands justly indebted to the above bounden Charles Jones in the fum of 100 l. " and is become bankrupt within the meaning of " fome or one of the flatutes concerning bankrupts, and if the above bounden Charles Jones shall cause " the commission to be executed according to the directions of an act of parliament passed in the fifth year of his late majesty's reign, intituled, An Act to prevent the committing of frauds by " bankrupts (a);" then this obligation to be void, " or elfe to be and remain in [full force and virco puere . 1895 The Charles fones, (L. S.") teen guineas for a propined to be advanced and ... ad or babn " first duly stamp'd) in the Lord chancellor faid, it was in the braggangang "

(a) If a country commission, " at [the place where the commission is to be executed in the country] above mentioned, or within ten miles of the same, and not within forty miles of the city of London," must be added here.

VILLOUIL

Samuel Gartho a of the bankrupt office. William Luther, of the benefit of the bankrupt office.

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If the petitioning creditor's (a) debt shall not be really due, or if after the commission taken out. it cannot be proved, that the party was bankrupt at the time of iffuing the commission, but on the contrary it shall appear, that the commission was taken out fraudulently and maliciously, then the Great Seal shall, on the petition of the bankrupt, examine into the same and order fatisfaction to be made him, for the damages by him sustained; and for the better recovery thereof may, in case there be occasion, assign such bond to the bankrupt, who may fue for the same in his own name.

The petitioning creditor in a commission of bankrupt against A. not being able to prove A. bankrupt at the time of the commission issued, it was superseded; and on a former day of petitions, lord chancellor (b) Hardwicke, upon the application of the bankrupt, made an order for affigning the bond to him, given by the petitioning creditor to the Great Seal, at the time of fuing out the

commission.

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" and if the above bounden The present application was to discharge that order, or at least to suspend any action upon the bond, till the damages fultained by the bankrupt

were enquired into.

and Act to prevent the The confideration of the petitioning creditor's debt on which he fued out the commission, was of a very extraordinary nature, 25 per cent, being charged for money pretended to be advanced, and fifteen guineas for a promium, and other exorbimamp d), in the tancies.

Lord chancellor faid, it was in the breaft of the court, where the bankruptcy was a doubtful cafe, and the commission superseded, either to direct an

<sup>(</sup>a) If a councey commillion, et at fine place where the commil (4) State & Gene an eligouf. 23.4 [vennes els al bareses of ou er and (6) Ach. Rep. san. lple830 virit auftim son bas come et in ellem and bobbe or flore "ad

by the bankrupt, or a quantum damnificatus upon an iffue at law, and after the damages were fettled, the court might, for the better recovery thereof, order such bond to be affigned; but the present case was attended with such flagrant circumstances, that he would not by a previous inquiry into the damages sustained by the bankrupt, prevent him from seeking an immediate satisfaction, and dismissed the petition.

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The fecretary of bankrupts, upon receiving the petitioning creditor's affidavit of debt duly fwom, and the bond properly executed by him, will get the commission sealed, which is always accompa-

nied with the creditor's petition.

### The creditor's petition (a) to the Great Seal for a commission of bankrupt.

"To the right honourable Charles lord Camden, 
baron of Camden Place in the county of 
Kent, lord high chancellor of Great Britain."

" In all humble manner complaining sheweth unto your lordship your orator Charles Jenes of,

&c. as well for himself as for all other the creditors of Francis Gibbons of, &c. That whereas

the faid Francis Gibbons, using and exercising the trade of a merchant by way of bargaining,

exchange, bartering, and chevizance, feeking

" his trade of living by (b) buying and felling, upon

okers, prokers, and factors, are hable to became his courts

(a) To be engroffed on a treble fix penny flamp fmall skin d perchment, See stat. 5 W & M. c. 21. s. 9 & 10 W. 3. c. 25 s. 22 Geo. 2. c. 35. s. 1.

f. 28. 22 Geo. 2. C. 35. 1. 1.

(b) This form is esteemed so authentic, and so general, that it suits all bankrupts, and is therefore printed and annexed indifferentiately to every commission; whereas the legislature has declared

"upon just and good causes, for wares and mer"chandizes to him sold and delivered, and also for
"ready money to him lent, being indebted unto
"your (a) orator in the sum of 100 L and upwards,
"of late (that is to say) about the month of

" of late (that is to fay) about the month of last past, did become bankrupt, within the " feveral statutes made against bankrups, to the " intent to defraud and hinder your faid orator " and others his creditors, of their just debts and "duties to them due and owing, (that is to fay) "WITHIN the statute made in the parliament be-" gun and holden at Westminster, the second day of " April, in the 13th year of the reign of Elizabeth " late queen of England, concerning bankrupts; " and within the statute made in the parliament be-" gun and holden at Westminster aforesaid, the 19th " day of March in the first year of the reign of the " late king James the first of England, France and " Ireland, and of Scotland the feven and thirtieth, in-"tituled, " An Act for the better relief of credi-" tors against such as shall become bankrupts;" " AND ALSO WITHIN the statute made in the par-" liament begun and holden at Westminster afore-" faid the 19th day of February in the one and twen-" tieth year of the reign of the faid late king James " the first of England, France and Ireland, and of " Scotland the feven and fiftieth, intituled, " An Act " for the further description of a bankrupt and " relief of creditors, against fuch as shall become "bankrupts, and for inflicting corporal punish-" ments upon the bankrupts in some special cases;"

that bankers, brokers, and factors, are liable to become bankrupts though they do not buy and fell. See the proper passages of the farmer part of this work.

(a) If the petition is by two creditors, it must be thus, " being indebted to your orators and others his creditors, in the sum of 150 L. and upwards;" if three, "200 L and upwards;" if in the participin, "to your orators as partners."

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" AND ALSO WITHIN the flatute made in the " fifth year of the reign of his late majesty king " George the second, intituled, " An Act to preer vent the committing of frauds by bankrupts," " or within some or one of them: IN TENDER " CONSIDERATION whereof, MAY IT PLEASE vour lordship to grant unto your orator, his ma-" jesty's most gracious commission, to be directed to fuch and so many, wife, honest, and discreet er persons, as to your lordship shall seem meet; " authorizing them thereby not only concerning the faid bankrupt, his body, lands, tenements, " freehold, and customary goods, debts, and other " things what soever, but also concerning all other of persons, who by concealment, claim, or other-" wife, do or shall offend touching the premises, or any part thereof, contrary to the true intent and meaning of the faid flatutes. To do and execute all and every thing and things whatfoever, as well for and towards satisfaction and or payment of the faid creditors, as towards and " for all other intents and purposes, according to " the ordinance and provision of the faid statutes, " and of any other statutes in force concerning 66 bankrupts. And your orator shall ever pray, and " fo forth." day of 1768.

" Let (a) a commission " iffue as prayed, and be " directed to Thomas Nuer gent, John Fenshawe, Hindley (b) deputy. " Champion Branfil, Ef-

" quires, Richard Wood, and Thomas Life, gen-" tlemen."

(a) This is called the flat. (b) Deputy patentee of the office for the execution of the laws and flatutes concerning bankrupts.

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Lord chancellor (a) Jeffries held, that he could not grant a commission of bankrupt ex officio, but that it must be on request of persons interested; and that if twenty men swore before him, that J. S. was bankrupt, yet without (b) petition of a creditor, he could not award a commission.

### A commission (c) of bankrupt.

" George the Third, by the grace of God of Great Britain, France, and Ireland, king, defender of " the faith, &c. to our trufty and well-beloved "Thomas Nugent, (d) John Fenshawe, Champion Bransil, Esquires, Richard Wood and Thomas Life, " gentlemen, greeting. Whereas we are informed, " that Francis Gibbons of, &c. using and exercising " the trade of a merchant by way of bargaining, " exchange, bartering and chevilance, feeking his " trade and living, by buying and felling about fince did become bankrupt within according of " the feveral statutes made against bankrupts, to " the intent to defraud and hinder Charles Jones " of, &c. and others his creditors of their just debts " and duties to them due and owing. WE mind-" ing the due execution as well of the flatute touch-

(a) Chanc. Caf. 191.

(b) Lord chancellor Talber declared, that a commission of bank-rupt must issue on the petition of some creditor who could be relieved under it. Cas. Temp. Talb. 243. S. P. resolved by the court of C. B. Freem. 270. pl. 298.

"ing orders for bankrupts, made in the parlia"ment begun and holden at Westminster, the setond day of April in the thirteenth year of the reign

(c) To be engrossed on a treble fix-penny stamp'd small skin of

parchment.

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(d) If a country commission, the names and places of abode of the commissioners are inserted; and they are named by the petitioning creditor.

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" of Elizabeth, late queen of England, made and or provided, as of the statute made in the parliament begun and holden at Westminster aforesaid the nineteenth day of March in the first year of " the reign of the late king James the first of En-" gland, France, and Ireland, and of Scotland the feven and thirtieth, intituled, "An Act for betet ter relief of creditors against such as shall become bankrupts:" AND ALSO the statute made in the parliament begun and holden at Westmin-" fler aforesaid, the nineteenth day of February in the one and twentieth year of the reign of the faid " late king James the first of England, France, and " Ireland, and of Scotland the seven and fiftieth, in-" tituled, " An Act for the further description of " a bankrupt, and relief of creditors against such " as shall become bankrupts, and for inflicting corporal punishments upon the bankrupts in some " special cases: AND ALSO of the statute made in " the fith year of the reign of king George the fe-" cond, intituled, " An Act to prevent the com-" mitting of frauds by bankrupts :" UPON TRUST of the wisdom, fidelity, diligence and provident " circumspection which we have conceived in you, do by these presents name, assign, appoint, con-" stitute, and ordain you our special commissioners, " HEREBY giving full power and authority unto vou, four or three of you, whereof you the faid "Thomas Nugent and John Fenshawe, to be (a) one, to proceed according to the faid statutes, and all other statutes in force concerning bankrupts, not

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<sup>(</sup>a) It seems therefore that the three last commissioners named in the commission, are not qualified by law to sit together, neither of them being quorum unus. See 3 Keb. Rep. 837. pl. 74. but this quorum clause is totally omitted in modern commissions, from, we presume, its having been solemnly determined, that there is no difference between an esquire and a gentleman. See the case of Williams

" not only concerning the faid bankrupt, his bo-" dy, lands, tenements, freehold and customary, " goods, debts, and all other things whatfoever, " but also concerning all other persons, who by " concealment, claim, or otherwife, do, or " shall offend, touching the premises, or any part. " thereof, contrary to the true intent and meaning of the faid flatutes; AND TO DO AND execute " all and every thing and things whatfoever, as " well for and towards fatisfaction and payment of " the faid creditors, as towards and for all other " intents and purpoles, according to the ordinance " and provision of the same statutes: WILLING " and commanding you four, or three of you, " whereof you the faid Thomas Nugent and John " Fenshawe to be one, to proceed to the execution " and accomplishment of this our commission, ac-" cording to the true intent and meaning of the " fame statutes, with all diligence and effect.

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v. Francis, bail of Nash. Trin. 4 Geo. 2. C. B. MS. Rep. S C. and S. P. in Fortes. Rep. 354. S. P. held in B. R. 2 Kel. 130. pl. 145. Bro. Abr. Tit. "Additions," pl. 44. Though the quorum clause is now usually omitted, yet as it may be reflored, the follosing observation is submitted; whether it would not be a valid objection, on a criminal profecution under the bankrupt laws, that among the commissioners who opened the commission, there was not one of the quorum, because I am informed by an authority of the first judicial character, " that where a commission issues to A. B. and others, or any two of them, of whom A or B. shall be one, and any of the others proceed, without the interpolition of either A. or B. in this case all proceedings are void, for want of a proper authority in the commissioners; it being an high misdemeanor in them so proceeding, and little (if any thing) short of murder in them all, in case the person so proceeded against, should be in consequence thereof tried, convicted, adjudged guilty of, and fuffer death. See 4 Black. Com. 383, 384. 4to edit. apply this doctrine to a person found bankrupt, by three commissioners, neither of them being of the querum, condemned and convicted for a capital offence under those laws.

(a) If the king is abroad, it is tested in the name of the queen regent, or of the lords justices.

(b) Patentee for executing the laws and flatutes concerning bank-rupts,

" WITNESS (a) Ourself at Westminster the

"day of in the eighth year of our f. (b) Yorke.

Lord chanc. Feffreys (c) held, that the granting of a commission of bankrupt was not a matter discretionary in him, but that he was bound to do it de jure; and that though the words in the act of parliament were, that the chancellor (d) may grant a commission, yet that (may) was in effect, as if it had been (must), shall grant, or ought to grant; and that it had been so resolved by all the judges.

Lord chancellor (e) Talbot declared, that nobody but a creditor could take out a commission against another, for that the acts of parliament were all

made for the relief of creditors.

The practifer having the commission (or indeed before for expedition) is to order one of the messengers to (f) summon three of the commissioners to whom the commission is directed, to attend at such time and place (usually a coffee-house) as suits the commissioners, the solicitor, and the parties, in order to open the commission.

The commissioners confist of fixty esquires and gentlemen divided into twelve lists, two of each list must be of the (g) quorum, one of whom ought (g)

(a) If the king is abroad, it is teffed in the name of the queen regent, or of the lords justices.

(b) Patentee for executing the laws and statutes concerning bankrupts.
(c) Mr. Vernon, Vern. 153. reports, that this cause was heard 16
Apr. 1683, 35 Car. 2. but the reporter of cases in Chancery says it was heard 8 Nov. 1687, 3 Jac. 2 2 Chanc. Cas. 191. so that we are at a loss to ascertain whether North or Jeffries presided on the decision of this cause. See Show. Rep. 202.

(d) The word in the act is shall.

(g) See fol. 310. Note (a)

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<sup>(</sup>f) Cas. Temp. Talb 2, 3.

(f) This right of summoning scems not at all settled, for it is claims ed by the commissioners, by the cierks to commissions, and by the messengers.

always to fit; the names of those gentlemen who at present have the honour of being in the commission, are as follow:

Ift Lift. Thomas Nugent, Elq. John Gafcoyn Fenshawe, Elq. Edward Wilmot, Elq. John Scott, Elq. John Acon, Gent. Samuel Denison, Gent. 2d Thomas Lane, Efq. Henry Hall, Efg. John Jackson, Esq. Augustine Greenland, Gent. Joseph Eyre, Gent. 2ª William Bumpfted, Efq. Charles Tirrel Morgan, Elq. John Bicknell, Elq. Robert Sewell, Elq. Henry Hunter, Elq.

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4th John Cookfon, Biq. John Crofts, Elq. Lancelot Brown, Efq. Alexander Baillie, Gent. Edward Barnard, Gent.

Henry Ruffell, Elq.

John Seare, Efq. Fowler Walker, Efq. Francis Talbot Scott, Elq. John Toomas Batt, Elq. Francis Ruffell, Gent. 6th

Jacob Reynardson, Elq. Charles Robinson, Esq. Francis Deroure, Efq. Isaac Bargrave, Gent. Leonard Martin, Gent.

7th Thomas Hotchkin, Elg. Michael Dodjon, Elq. Jobn Elderton, Gent. Robert Fry, Gent.

> Thomas Burrell, Elq. Delme Van Hey:buyjen, Elq. Edward Dandridge, Elq. Richard Calvert, Elq. Robert Hoffell, Gent. oth

Henry Boult Cay, Efg. Anthony Pye, Elq John Lancaster, Gent. Richard Hargrave, Gent. toth

Charles Nalson Cole, Esq. George Harding, Elq. Harry Peckbam, Elq. John Blake, Gent. Joseph Cruttenden, Gent.

Nathaniel Fones, Elq. Andrew Huddlefton, Eig. John Lloyd, Elq. William Morgan, Gent. Christopher Couper, Gent

Arthur Murphy, E.q. Henry Hawley, Esq. Robert Comyn, Elq. Thomas Mullo, Elq. Randle Ford, Elq.

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The names and offices of the messengers to the commissioners of bankrupts.

George Surridge, No. 10. Symonds Inn.

David Caddell,
Thomas Vaughan,
James Down,
James Paris,
Francis Newman,
Thomas Powell,
John (a) Wells,
Alexander Pennington,

Chancery-lane.

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Previous to the meeting of the commissioners, it will be necessary for the practising solicitor to be furnished with a proper deposition of the party's being a trader, and of his having committed an act of bankruptcy; and also of the petitioning creditor's debt; and to get the witnesses who are to prove the trading, and the act of bankruptcy; the debt of the petitioning creditor must be proved by a copy of his affidavit taken at the bankrupt office, and (b) exhibited to the commissioners.

Presuming now that the practiser is supplied with whatever is necessary for him to give in evidence at the first meeting, we will proceed to inform him of the commissioners, and his duty, and business at that meeting.

....

(a) Or at his office, No. , Clement's Inn.

(b) That is, you must underwrite the affidavit thus;
At, &c. day of June 1768.

Exhibited to us under the commission of bankrupt against Francis
Gibbons,

Thomas Nugent, John Fenshawe, Champion Bransil.

### First meeting.

At this meeting, which is called a private (a) one, the commissioners who attend, first of all qualify themselves, by administring to each other the

following (b) oath, uncovered.

"I Thomas Nugent do swear, that I will fairh"fully, impartially, and honestly, according to the
best of my skill and knowledge, execute the se"veral powers and trusts reposed in me as a com"missioner, in a commission of bankrupt against
"Francis Gibbons of, &c. and that without sayour
or affection, prejudice or malice.

So help me God."

A memorial of this oath is to be figned by the commissioners, (and is usually witnessed by the clerk to the commission) and kept among the proceedings

under the commission.

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These proceedings should be wrote fair, large, and wide, (to give room for amendments and interlineations) on brief paper, with a quarter margin, for the commissioners to set their (c) names upon, (after they have been signed by, and sworn to by the parties) beginning a fresh sheet at each date or new proceeding, except the depositions (d) of creditor's debts, three of which may be wrote on one sheet;

(a) And therefore the debt of the petitioning creditor cannot be proved at it, for no debt, much left hir, can be proved but at a public fitting, of which, feven days notice at least, hath been previously given in the London Gazette.

(b) Which oath any two of the commissioners are by stat. 5 Gas.

2. c. 30. f. 44. empowered to administer to each other.

(c) The commissioners sign them at the foot, if it be their own act, as taking the oaths, declaring the party bankrupt, &c. If it be the act of a third person, as the deposition of the trading, act of bankruptcy, of a debt, &c. the first signs at the top of the margin, the second in the middle, and the third at bottom.

(d) These are never on stamps. See fol.

(a) they are to be annexed to each other, and covered with parchment or cartridge paper, upon which are to be inderfed the three fittings at Guildhall, as the communisheners always appoint them at this meeting.

### The Preamble or Title to the Proceedings.

16 Proceedings, examinations, and depositions " had and taken at Serle's Coffee-house, Lin-" coln's Inn, in the county of Middlefex, this day of June, in the year of our Lord " 1768, under and by virtue of his majesty's " commission of bankrupt awarded and issued against FRANCIS GIBBONS of, &c. directed " to us Thomas Nugent, John Fenshawe, Cham-" pion Branfil, Esquires, together with Rich-" ard Wood, and Thomas Life, gentlemen, in " the faid commission named, which said com-" mission is dated at Westminster, the day of June, in the eighth year of the reign of our fovereign lord George the Third, by " the grace of God, of Great Britain, France " and Ireland, king, defender of the faith, and " so forth; and in the said year of our Lord " 1768."

Indorse on this preamble, that the commissioners have appointed the 5th and 15th of July, and day of August next, to be days of sitting, and have ordered that they be so put in the Gazette. " t

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<sup>(</sup>a) Number them at the bottom, and so do all proceedings.

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### Memorial of the qualification of the commissioners.

" Memorandum, that we Thomas Nugent, John " Fenshawe, and Champion Branfil, Efquires, being " the major part of the commissioners named and " authorized in and by a commission of bankrupt " awarded and iffued against Francis Gibbons of, &c. or did administer to each other, and severally take " the oath appointed to be taken by commissioners. " of bankrupts, prescribed and specified in and by " an act of parliament made in the fifth year of the " reign of his late majesty king George the Second, " intituled, " An Act to prevent the committing of frauds by bankrupts," before we proceeded to " act in the execution of the faid commission, ac-" cording to the directions of the faid act." Witness. Thomas Nugent, John Fenshawe, Fames Browne, [Clerk to the commission.] Champion Branfil

Oath to be administered by the commissioners, uncovered, to the witnesses, upon their examination.

"You are here produced as witnesses by virtue of a commission out of the high court of Chan"cery, to us, and others directed, to be by us examined concerning the bankruptcy of Francis
Gibbons of, &c. Now to all (a) such questions
and interrogatories as shall be asked you by virtue of this commission of bankrupt, concerning
the said Francis Gibbons, his trade or profession,
his absconding, and other acts which he hath

<sup>(</sup>a) Particularly, whether the contents of the deposition are true on the oath taken? and, whether the name subscribed thereto is of the examinant's own proper hand-writing?

done or suffered, by which he may be discovered to be bankrupt: and also concerning his lands and tenements, goods and chattels, debts and du-

ties, frauds and concealments, and other matters and things in obedience to the faid commission,

" and pursuant to the several statutes made concerning bankrupts, you and (a) every of you shall

" true and direct answer make, and (b) swear the truth, the whole truth, and nothing but the truth.

" So help (b) you God."

If you cannot prevail on the witnesses, who are to prove the trading or act of bankruptcy to attend, you must prepare a summonce to them from the commissioners for that purpose.

Summonce to compel a person to attend, who refused, to be examined on a commission.

" By virtue of a commission of bankrupt awarded and issued against Francis Gibbons of, &c. you

" and every of you, to whom this our summonce is

" directed, are hereby commanded and required, " personally to be and appear before us, whose

names are hereunto subscribed, or the major part

of the commissioners, in the said commission

" named and authorized, on fight hereof, at Serle's coffee-house, Lincoln's Inn, at fix o'clock in the

evening, then and there to be examined, by vir-

" tue of the faid commission, and the several sta-

" tutes therein mentioned; and hereof you are not

(a) If two only, each; it is usual to swear three at a time.

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<sup>(</sup>b) If the witness har pens to be a Quaker, then instead of fwear, say, "you shall solernly, sincerely, and trully declare and affirm." See Stat. 8 Geo. c. 6. s. and omit the words " So belp you " Ged,"

"to fail at your peril. Given under our hands this day of June 1768."

To be here directed to the witnesses.

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Thomas Nugent, John Fenshawe, Champion Branfi'.

A true and examined copy of the above summonce must be personally delivered to the witnesses respectively by the messenger, or less by bim at their respective lodgings, or at their last and usual places of abode: if the witnesses do not attend, upon being duly served, the commissioners (on oath being made before them of the service) will execute a warrant for their commitment.

Warrant to apprehend and commit a person to gaol, who refused to attend to be examined, upon having been duly summoned.

"WHEREAS his majesty's commission under the Great Seal of Great Britain, bearing date the day of June last past at Westminster. grounded on the several statutes made and now in sorce concerning bankrupts, hath been awarded ed and issued against Francis Gibbons of, &c. directed to us who have hereunto subscribed our names, and set our seals, and to Richard Wood and Thomas Life, gentlemen, and we being the major part of the commissioners therein named, (one whereof is of the (a) Quorum) having begun to put the said commission into execution, and it appearing to us that the act of bankruptcy intended to be proved against the said Francis Gibbons, is his lying in prison two months upon

<sup>(</sup>a) See fol. 310. Note (a).

" an arrest for debt; and that 7. W. officer to the " theriff of Middlefex, was the person who arrested the faid Francis Gibbons, on which arrest the faid Francis Gibbons lay in prison two months as afore-" faid; and that the faid J. W. was duly fum. " moned to appear before us, but hath made de-" fault, in contempt of our authority, and of the statutes, and also of the commission aforesaid, and the authority thereby to us given: These are " therefore to will, require, and authorize you, and every of you, immediately upon receipt hereof, " to apprehend, arrest, and take into your custody " the body of the faid J. W. and him fafely to convey to his majesty's gaol of Newgate, and him " there to deliver to the keeper of the faid gaol, who is hereby required and authorized by virtue " of the said commission, and statutes aforesaid, to " receive the faid J. W. into his cuftody, and " him fafely to keep and detain without bail or " mainprize, until he shall submit himself to be ex-" amined according to the true intent of the statutes, and be thence delivered by due course of " law; and for your fo doing, this shall be your " fufficient warrant, given under our hands and day of June in the year ce feals the " of our Lord 1768."

To George Surridge our messenger, or Robert Brown his assistant, and to Richard Akerman, keeper of his majestry's gaol of Newgate, or to his deputy there.

Thomas Nugent, (L. S.) John Fenshawe, (L. S.) Champion Branfil. (L. S.)

Warrant

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Warrant to commit a witness who refused to sign bis examination.

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WHEREAS a commission of bankrupt, under the Great Seal of Great Britain, bearing date at " Westminster the day of June in-" flant, grounded upon the feveral flatutes made " and now in force concerning bankrupts, hath " been awarded and iffued against Francis Gibbons of, &c. directed unto Thomas Nugent, John Fen-" Shawe, Champion Branfil, Esquires, and to Rich. ard Wood and Thomas Life, gentlemen, thereby " giving full power and authority to the faid commissioners, four or three of them, to proceed according to the feveral statute made and now in " force concerning bankrupts. AND WHEREAS " David Stone of London, merchant, was on the day of June instant, present at a " meeting before us whose hands and seals are here-" unto fubscribed and fet, being the major part of " the commissioners named and authorized in and " by the faid commission; and the faid David Stone " being (a) fworn and examined by us, the major

<sup>(</sup>a) If the commitment be for refusing to be sworn, and to answer interrogatories, the warrant runs thus; "AND WHEREAS J. 3. was suspected to have embezzled, concealed, and secretly disposed of, a great part of the goods and estate of the said Francis Gibbons, and was duly summoned to appear before us, who made default in concempt of our authority, but at length came and appeared before us, we then stting in the execution of the said commission, did obstinately refuse to be sworn, though often required by us so to be, and also obstinately refuse to make answer to such interrogatories and questions as we, by virtue of the said commission, required him to answer unto, concerning the said Francis Gibbons and his estate, according to the true meaning of the said statutes, for the discovering the estate of the said Francis Gibbons, in contempt of the said statutes, and of the commission aforesaid, and the authority thereby to us given; We therefore, &c. as above.

part of the faid commissioners in the said commis-" fion named, touching the trade and dealings of " the faid Francis Gibbons, and also concerning several acts of bankruptcy supposed to be commit-" ted by the faid Francis Gibbons, which examina-" tion of the faid David Stone was reduced and taken down in writing, and fuch writing was read e over to him (and to the wording of which faid examination, the faid David Stone declared he " had no reasonable objection) notwithstanding " which the faid David Stone refused to fign or sub-" fcribe fuch examination, fo reduced and taken down in writing, as aforesaid, though often re-" quired by us so to do; We therefore whose " hands and feals are hereunto subscribed and fer, for being the major part of the commissioners in the se said commission named, do hereby will, require, and authorize you, immediately to take into your custody the body of the said David Stone and him " fafely to convey to his majesty's prison of the Fleet, and him there to deliver to the warden of " the faid prison, who is hereby required and au-" thorized to receive the body of the faid David Stone into his custody, and him fafely to detain, es without bail or mainprize, until he shall sub-" mit himself to the commissioners in the said com-" mission named, or the major part of them, and " shall fign or subscribe the examination aforesaid, " according to the true intent and meaning of the faid statutes in the said commission, or be otherwife delivered by due course of law, for which this shall be your sufficient warrant. Given un-46 der our hands and feals, this 46 June 1768." To George Surridge Thomas Nugent. (L. S.)

our messenger, &c. [as before]

John Fenshawe. (L. S.) Champion Branfil. (L. S.)

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Declaration of the commissioners that they have found the party bankrupt.

"Memorandum, that we, whose names are hereunto subscribed (or underwritten) being the major part of the commissioners named and authorized, in and by a commission of bankrupt, awarded and issued against Francis Gibbons of, &c.
having met the day and year, and at the place
above-mentioned, and having proceeded to act in
the execution of the said commission, have, upon
good proof, upon oath before us had and taken,
found, that the said Francis Gibbons did (a), before the date, and suing forth of the said commission become bankrupt, within the true intent
and meaning of the several statutes made, and
now in force concerning bankrupts, some one
of them; We do therefore hereby adjudge and
declare him bankrupt accordingly."

Thomas Nugent, John Fenshawe, Champion Branfil.

As foon as the commissioners have declared the party bankrupt, they execute a warrant for seizing his effects, and sign a summonce for him to surrender.

(a) Lord chancellor Talbet faid, that the general rule was, not to determine the time of the bankruptcy, but only that the person was bankrupt antecedent to the commission; for then all the creditors before that time would have a right to come in; but when that matter was minutely entered into, it must be distinguished which creditors were precedent, and which were subsequent to the act of bankruptcy. Cas. Temp. Talb. 243, 244. See fol. 1. Note (a). The commissioners are generally cautious in declaring the bankruptcy for a certain time, but leave it to a trial at law, in case there be any question or doubt of it; and this is to secure themselves from actions that may be brought against them. Beaver's Lex mercat. redivin. 494. And it is also observable, that the declaration of the commissioners, whether he be bankrupt or not, doth not acquit or charge him unless in truth it were so. 2 Sid. 176. T. Raym. 337. 2 Chanc. Cas. 153. Good. 36, 37.

### Warrant of Seizure.

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WHEREAS his ma-Thomas (L. S.) Nugent. " jefty's commission, un-" der the Great Seal of Great Britain, grounded " upon the feveral statutes made and now in force, concerning bankrupts, bearing date at Westminet fer the same day with this our warrant, hath been awarded and issued against Francis Gibbons of, &c. " directed unto us, who have hereunto subscribed our names, and fet our feals, together with Richard Wood and Themas Life, gentlemen, and we being the major part of the commissioners " named and authorized, by virtue of the faid " commission, having begun to put the said com-" mission in execution, upon due examination of witnesses, and other good proof, upon oath, beof fore us taken, have found that he the faid Francis Gibbons, did for several years last past, use and exercise the trade of a Printseller in buying of or prints and felling the fame in the way of his " trade aforefaid; and have also found that he the " 64 faid Francis Gibbons, by reason of such his dealing, became indebted unto Charles Jones of, &c. in the fum of 100 l. and upwards, for goods fold " and delivered. AND we have also found, upon " good proof upon oath, that the faid Francis Gib. bons did; before the date John (L. S.) Fenshawe. " and Tuing forth of the " faid commission, become 66 bankrupt, within the true intent and meaning of the feveral statutes made, and now in force " concerning bankrupts, some, or one of them, before the date and fuing forth of the commilof fion; and we have adjudged and declared him bankrupt accordingly: These are therefore, by wirtue of the faid commission, and the several sta-" tutes therein mentioned, to will and require, au-66 thorize

" thorize and impower you, and every of you to whom this our warrant is directed, forthwith to " enter into and open the house and houses of him the faid Francis Gibbons, and also into all other " place and places belonging to him the faid Fran-" cis Gibbons, where any of his goods are, or are " fuspected to be, and there seize all the ready mo-" ney, jewels, place, houshold stuff, goods, mer-" chandizes, books of accompt, and all other " things whatfoever, belonging to him the faid " Francis Gibbons. And fuch things as you shall " fo seize, you shall cause to be inventoried, and ppraised by honest men of skill and judgment, " and the fame you shall return to us with all con-" venient speed; and what you shall so seize, you " shall safely detain and keep in your possession, " until we shall give you order for the disposal " thereof; and in case of resistance, or of not hav-" ing the key or keys of any door or lock belong-" ing to any place or places of (a) him the faid " Francis Gibbons, where any of (a) his goods are, " or are suspected to be, you shall break open, or " cause the same to be broke open, for the better " execution of this our warrant. Given under " our hands and feals this " of

Champion (L. S.) Branfit. " the year of our Lord " 1768."

" To George Surridge our melfenger, and to all mayors, bailiffs, constables, headboroughs, and all other his majesty's loving subjects, whom we require to be aiding and affifting in the execution of this our warrant, as occasion shall require." (a) See fol. 78. Note (b).

### Summonce for the bankrupt to surrender.

WHEREAS a commission of bankrupt on the day of now last past, iffued under the Great Seal of Great Britain against " you Francis Gibbons, by the name and descrip-" tion of Francis Gibbons of, &c. AND WHEREAS the major part of the commissioners in and by " the faid commission named and authorized, have 65 declared you to be bankrupt; We the faid com-" missioners do hereby summonce and require you the faid Francis Gibbons personally to be and ap-" pear before the commissioners in the said commisfion named, or the major part of them, on (a) the 23 day of instant, at ten in the " morning, and on the and next, at four o'clock in the after-" noon at Guildhall, London, then and there to be examined, and to make a full and true discovery and disclosure of all your estate and effects, according to the directions of the several statutes es made, and now in force concerning bankrupts, and particularly the statute passed in the fifth year . of the reign of his late majesty king George the " Second, intituled, " An Act to prevent the com-" mitting of frauds by bankrupts;" and herein you " are not to fail at your peril. Given under our es hands this day of " 1768."

To Francis Gibbons, the bankrupt.

Thomas Nugent, John Fenshawe, Champion Branfil. and the coder (his vas to till the in the ing yet fameet

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<sup>(</sup>a) According to the days fixed by the commissioners in the Ga-

As foon as the warrant of feizure is executed, and the bankrupt has received his summonce from the commissioners, he ought in prudence to surrender (a) himself at their first fitting, as well to shew his willingness of complying with the commission, as to secure himself from arrest and imprisonment, till the time of his last examination, whether within the forty-two days, or the surther time allowed him by the act (b) of parliament, for finishing the same, being forty (c) nine days, though his appearing at the first sitting is not absolutely necessary; yet sometimes he surrenders himself even at this first meeting, for the sake of being protected.

Memorandum of the bankrupt's furrendering himfelf.

#### At, &c.

Thomas Nugent. "Memorandum, that Francis Gibbons, &c. against whom the

- " commission of bankrupt now in prosecution, is warded and issued, did, the day and year, and
- " at the place above-mentioned, voluntarily come
- " and furrender himself to us the major part of
- "the commissioners named and authorized in and by the said commission, and submitted himself to
- " be examined, and in all things to conform him-

<sup>(</sup>a) Lord chancellor Hardwicke said, as the acts of parliament were very perilous to bankrupte, it was reasonable for a man, though he believed himself no bankrupt, to go before the commissioners, surrender, and submit to be examined by them, still protessing himself no bankrupt; and that after passing through all such process, his lordship agreed the bankrupt might bring an action. See 2 Vd. Rep. 326. pl. 107.

<sup>(</sup>b) Stat. 5 Geo. 2. c. 30. f. 6.

<sup>(</sup>c) The statute says fifty days, but the lord chancellor's order is for forty-nine days, because the fiftieth day may happen to fall on a Sunday.

" felf to the directions of the several statutes made

" and now in sorce concerning bankrupts, and par
" ticularly to the statute made in the

John Fenshawe. " the fifth year of the reign of his

" late majesty king George the se
" cond, intituled, "An Act to prevent the com
" mitting of frauds by bankrupts," in order to have

" the benefit of the said act. Francis Gibbons.

" And the said Francis Gibbons being sworn and

" examined the day and year abovesaid, upon his

" oath saith, that he is not at present prepared to

" make a full disclosure and discovery of his estate and effects, but prays further time for doing the

" ingly."

" fame to the next fitting, which Champion Branfil." is hereby granted him accord-

Francis Gibbons.

If the bankrupt furrenders himself at this meeting, the commissioners indorse the following memorandum, on his summonce to surrender; by this he will be indisputably protected.

#### At, &c.

"Memorandum, That the within named Prancis Gibbons, the day and year, and at the place abovementioned furrendered to us whose names are hereunto subscribed, being the major part of the commissioners named and authorized in and by a commission of bankrupt awarded and issued, and now in prosecution against the said Francis Gibbons, and submitted himself to be examined from time to time touching his estate and essential and declared upon oath, that he was not prepared to make a full disclosure and discovery, and prayed

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(a) (b) clause " prayed further time for that purpole, which was granted to him accordingly."

Thomas Nugent, John Fenshawe, Champion Branfil.

The bankrupt having (a) furrendered shall be free from arrest by his (b) creditors, in coming to surrender, and from his actual surrender to the commissioners, for the forty-two days, or such further time as shall be allowed him for finishing his examination, provided he was not in custody at the time of his surrender and submission to be examined.

From the following case it appears, that the bankrupt will be free from arrest by his creditors, from the notice in the Gazette, to the first sitting, though he has not actually surrendered to the commissioners, if he does not missehave himself in the intermediate time.

A commission of bankrupt issued against Philips de Fries in the month of July 1732, and he was declared bankrupt, and required to surrender himself to the commissioners: and when the messenger executed the warrant of seizure, the bankrupt, without resistance, delivered up his keys and effects to him, and promised to submit to the commissioners, and comply with the directions of the act.

The summonce was not served upon him till the first day mentioned for his surrender in the Gazette (and three days after executing the warrant and seizure) and about an hour after service of the summonce, and before he surrendered himself, he was

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<sup>(</sup>a) Stat. 5 Geo. 2. c. 30 f. 5.
(b) Lord Hardwicke faid, that bail were not creditors within the clause. Ask, Rep. 238. pl. 130.

arrested, and thereupon he petitioned the lord chancellor, amongst other things, to be discharged; and the petition came on to be heard before he had surrendered himself; and upon the hearing, lord chancellor (a) King so far considered what he had done (and which was all that he could then do) as a compliance with the act, that he held he ought to be discharged, but dissuaded the bankrupt from suing the officer for the penalty; and thereupon an order was made accordingly by consent.

If the bankrupt shall be arrested for debt, or on any escape warrant, coming to surrender, or after his surrender, within the time above-mentioned; then, on producing the summonce or notice under the hands of the commissioners or assignees, and giving the officer a copy thereof, he shall be discharged; and in case any officer shall detain him, he (b) shall forfeit to the bankrupt, for his own use,

5 1. for every day he shall detain him.

In case the bankrupt happens to be in prison at the time of his being declared bankrupt, and the petitioning creditor proves his debt at this meeting, and is desirous of seeing such bankrupt prisoner, the commissioners will give him a certificate of his having proved his debt, in pursuance of the (e) statute.

### The certificate.

"We whose names are hereunto subscribed, being the major part of the commissioners named and authorized in and by a commission of bank-

(a) Beawe's's Lex mercat. rediviv. 496.

(b) Stat. 5 Geo. 2. c. 30. f. 5. (c) Stat. 5 Geo. 2. c. 30. f. 19.

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"tion against Francis Gibbons of, &c. do hereby certify that Charles Jones of, &c. hath proved a debt under the said commission. Witness our hands this day of June, in the year

" our Lord 1768."

Witness [clerk to the commission].

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Thomas Nugent, John Fenshaw, Champion Branfil.

Certificate for a judge or justice of peace to grant his warrant for apprehending and committing a bank-rup.

In the matter of Francis Gibbons, bankrupt.

"We whose names are hereunto subscribed, and seals (a) set, DO HEREBY CERTIFY, that a commission of bankrupt, under the Great Seal of

"Great Britain, grounded upon the several statutes

" made, and now in force, concerning bankrupts,

" bearing date at Westminster, the

" day of October instant, hath been awarded and 
issued against Francis Gibbons of, &c. and directed 
to Thomas Nugent, John Fenshawe, Champion Bran-

" fil, Esquires, Richard Wood and Thomas Life, gen" tlemen, thereby giving full power and authority,

" to the faid commissioners, four or three of them,

" to execute the same. AND WE DO FURTHER "CERTIFY, that we being the major part of the

" commissioners, by the said commission authorized,

" have proceeded in the execution of the faid commission, and have found, upon the due exami-

<sup>(</sup>a) Sec Stat. 5 Gto. 2. c. 30. f. 14.

nation of witnesses, and other good proof upon oath, before us had and taken, that the said Francis Gibbons, before the date and suing forth of the said commission, became bankrupt, to all intents and purposes, within the compass, true intent and meaning of the several statutes made and now in force concerning bankrupts, or within some or one of them, before the date and upon furing forth of the said commission. Given under our hands and seals at Serle's cosse-house, Lincoln's Inn, in the county of Middlesex, this day of June, in the year of our Lord 1768.

Witness Thomas
(a) Brown.

Thomas Nugent. (L. S.) John Fenshawe. (L. S.) Champion Branfil. (L. S.)

If there is any reason to apprehend that an extent may issue at the suit of the crown against the bankrupt's effects, it will be proper to have a provisional assignment executed at this meeting, which will entirely deseat such extent.

## Provisional (b) assignment.

"THIS INDENTURE, made the day of June, in the eighth year of the reign of our fovereign lord George the Third, by the grace
of God, of Great Britain, France and Ireland,
king, defender of the faith, and fo forth, and in
in the year of our Lord 1768. BETWEEN Tho-

(a) This witness must prove the execution of the certificate, before the judge or justice, else he will not grant his warrant.

(b) This is to be engroffed two parts on half-crown stamped skins of parchment.

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mas Nugent, John Fenshawe, and Champion Bran-" fil, Esquires, the major part of the commission-" ers named and authorized, in and by a com-" mission of bankrupt, awarded and issued against " Francis Gibbons of, &c. of the one part, and " William Chessbyre of, &c. gentleman, of the " other part. WHEREAS his majefty's commission " under the Great Seal of Great Britain, grounded " upon the feveral statutes made and now in force " concerning bankrupts, bearing date at West-" minster, the day of Fanuary in " the year of our Lord 1768, hath been awarded " and iffued against the said Francis Gibbons, and " and directed to Thomas Nugent, John-Fenshawe, " Champion Branfil, Esquires, Richard Wood and "Thomas Life, gentlemen, thereby giving full " power and authority to the faid commissioners, " four or three of them, to execute the same com-" mission, as by the same commission, relation " being thereunto had, more fully and at large " it doth and may appear. AND WHEREAS up-" on the execution of the faid commission, it ap-" peared to the major part of the commission-" ers in the faid commission authorized, upon " due examination of witnesses and other suffi-" cient proof, upon oath, before them had and " taken, that the faid Francis Gibbons did, from " the month of January 1760, carry on the trade " and bufiness of a merchant, exporting and im-" porting divers kind of goods, and did by fuch " trade and bufiness feek and endeavour to get " his living, as other merchants usually do, and " in the course of his said trading and dealing " he became indebted unto Charles Jones of, &c. " in the fum of 100 l. and upwards, for goods " fold and delivered. AND WHEREAS the faid " Fran-

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" Francis Gibbons did, in the judgment of the ma-" jor part of the faid commissioners, become " bankrupt to all intents and purposes, within the compass, true intent and meaning of the several " statutes made, and now in force concerning bankrupts, or within some or one of them, be-" fore the date and fuing forth of the faid com-" mission, and they did adjudge and declare him " bankrupt accordingly. AND WHEREAS the faid " commissioners, parties to these presents, in sur-" ther execution of the faid commission, and of " the statutes therein mentioned, have also found out and discovered, or it otherwise appeared to "them, that the faid Francis Gibbons at the time " he became bankrupt, as aforefaid, or afterwards, " was possessed of, interested in, or well intitled " unto fundry goods, wares, chattels, merchan-" dizes, stock in trade, houshold stuff, implements " of houshold, bedding, plate, linen, and other "things, and that there were also divers debts, " fum and fums of money due and owing unto " him the faid Francis Gibbons and his estate, from " feveral persons: AND WHEREAS the said com-" missioners, parties hereto, think it necessary, for " the better preferving and fecuring the effate of the faid Francis Gibbons, to appoint an affig-" nee provisionally of his estate and effects, until " choice shall be made, by the major part in va-" lue of the creditors of an affignee or affignees of the estate and effects of the said oankrupt, " pursuant to notice to be given in the London "Gazette for that purpose: Now THIS INDEN-"TURE WITNESSETH, that the faid commissioners, parties to these presents, for the purpole " aforesaid, and in further execution of the said " commission, and of the statutes therein men.

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tioned, and by force and virtue thereof, and for " and in confideration of the fum of 5 s. of lawful " money of Great Britain, to them the faid com-" missioners, parties to these presents, in hand paid by the faid William Chessbyre, at or before the " fealing and delivering of these presents, the receipt " whereof is hereby acknowledged, and also in " confideration of the covenants herein after con-" tained, on the part and behalf of the faid Wil-" liam Chessbyre, his heirs, executors and admini-" strators, to be kept, done, and performed, Do " hereby appoint the faid William Chessbyre affignee of the estate and effects of the said Francis Gib-" bons; and HAVE also ordered, bargained, sold, " disposed, affigned, and set over; And by these " presents Do, as much as in them the said com-" miffioners, parties to these presents, lieth, and " they lawfully may order, bargain, fell, dispose, " affign and fet over, unto the faid William Chef-" fbyre, the messenger under the said commission, " his executors, administrators, and affigns, all and " fingular the goods, wares, and merchandizes, " chattels, flock in trade, debts, sum and sums of " money, houshold fluff, and all implements of " houshold, and other the personal estate what-" soever of the said Francis Gibbons, of which he " was possessed, or intitled unto, or which any " other person or persons was or were possessed, "IN TRUST for him at the time he became " bankrupt, or at any time fince; To HAVE " AND TO HOLD, alk demand, fue for, reco-" ver, levy, and receive all and fingular the pre-" miles thereby affigned, or mentioned, or intend-" ed fo to be, unto the faid William Chesfbyre, " his executors, administrators and assigns, In "TRUST for the immediate preservation thereof,

" and to and for the ufe, benefit, and advantage of " all the creditors of the faid Francis Gibbons, who " have already fought, or shall hereafter, in due " time, come in and feek relief under the faid " commission, according to the several statutes " therein mentioned, or some or one of them, and " to and for no other use, trust, intent, or purpose " what soever; AND the faid William Chessbyre doth " hereby for himself, his heirs, executors, and ad-" ministrators, and for every of them, covenant, of promise, and agree, to and with the said com-" m flioners, parties to these presents, their exe-" cutors and administrators, and to and with every of them, in manner and form following, (that is " to fay) That he the faid William Chessbyre, his " heirs, executors, or administrators, some or one " of them, shall and will, as foon as an affignee or " affignees of the faid bankrupt's effate and effects " shall be duly chosen and appointed, pursuant to " notice in the London Gazette, and when he shall " be thereunto required for that purpose, join with " the major part of the commissioners named in " the faid commission, in the making an assign-" ment of all and fingular the faid goods, chattels, debts, fum and fums of money, wares and " merchandizes, and all other the premisses here-" in before mentioned or intended to be hereby " affigned, unto fuch person or persons as shall " be duly chosen and appointed to be the affignee or affignees of the said bankrupt's estate; AND " that he the faid William Chessbyre shall and will " also deliver up all the estate and effects of the " faid bankrupt, as shall or may have come to " the hands or possession of him the said William " Chessbyre, or to the hands or possession of any " other persons, IN TRUST for him and for his

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" ule, unto fuch person or persons as shall be duly " chosen affignee or affignees of the faid bankrupt's " effate and effects, or o herwife as the faid commif-" fioners shall direct or appoint. AND FURTHER " that he the faid William Chesshyre his heirs, exe-" cutors, and administrators, shall and will from " time to time, and at all times hereafter, well and " fusiciently fave, defend, keep harmles, and in-" demnified, ALL the faid commissioners in and " by the faid commission named and authorized, " their heirs, executors, and administrators, and " every of them, their and every of their bodies, " lands, tenements, goods, chattels, and effare "whatfoever, of, from, and against all and a'l " manner of action and actions, fuits, arrefts, com-" plaints, cofts, damages, and expences, what-" foever, which they or any of them shall or may " fultain, or be put un:o, for or by reason or means " of this prefent deed of affignment, or any act or " acts to be done or executed by him the faid If il-" liam Chessbyre in pursuance or by virtue of the faid " commission, or deed of assignment respectively. "In WITNESS whereof the faid parties to these " presents have hereunto interchangeably set their " hands and feals the day and year first above-" written."

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## Advertisement (a) for the Gazette.

"Whereas a commission of bankrupt is awarded and issued forth against Francis Gibbons of, &c. and he being declared bankrupt, is hereby required to surrender himself to the commissioners in the said commission named, or the major part

<sup>(</sup>a) The messenger pays for the room, and inserts this advertisement in the Gazette.

" of them (a) on the Day of next at o'clock in the noon; on the day " of the fame month at o'clock in the following, at " noon; on the day of o'clock in the noon, at Guildhall, London, and make a full discovery and disclosure of his estate and effects; when and where the " creditors are to come prepared to prove their " debts; at the fecond fitting to chuse affignees; " and at the last sitting the faid bankrupt is " required to finish his examination; and the cre-"ditors are to assent to or dissent from the allow-" ance of his certificate: all persons indebted to " the faid bankrupt, or who have any of his effects, " are not to pay or deliver the fame, but to whom " the commissioners shall appoint, but give notice " to (b)."

## First Sitting at Guildhall.

Against this sitting the practifer should provide himself with the Gazette, in which the sitting at Guildhall, fixed by the commissioners, are inferted.

As creditors may come in at this fitting, we will here give precedents of the feveral forms of depositions, necessary from the various demands of creditors: first observing, once for all, that accompts current, assignments, bills of exchange, bonds, decrees, letters of administration, notes of hand, probates of wills, protests, reports, and all other securities whatsoever, must be produced by the respective creditors, at the time of their proving

(b) The clerk to the commission.

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<sup>(</sup>a) These sittings should be ten or eleven days distance from each other, and the last sitting must be on the forty-second day, from the date of the Gazette.

their debts, and be exhibited to the commissioners. And also further observing that the commissioners are not authorized to receive proof of debts at private meetings; they ought to be public sittings, and seven days notice thereof at least previously given in the London Gazette; and notwithstanding the debts to be proved, should be so directed by an order from the great seal.

## Oath for proving a Debt.

"You shall swear, that Francis Gibbons of, &c. at the time of his becoming bankrupt, was just"ly and bona fide indebted to you in the sum of and that you have not since been any ways paid or satisfied the same, or any part there"of." So help you God."

Though (a) a witness will neither lay his hand on, nor kis the book, on his being sworn, yet his evidence is good.

Jews are suffered to put (b) on their hats while they take the oath.

Be fure to inquire whether the debt was contracted while the bankrupt was in trade.

## Depositions.

All creditors must fign and swear to the truth of the depositions or proofs of their debts.

Deposition of the petitioning Creditor's Debt.

Thomas Nugent. "Charles Jones of High Hol-"born, in the county of Middle-

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<sup>(</sup>a) 2 Sid. 6. Atk. Rep. 42.

<sup>(</sup>b) 2 Stra. 821.

" fex, mercer, being fworn and examined the day " and year, and at the place abovefaid, upon his " oath faith, that Francis Gibbons of, &c. the per-" fon against whom the commission of bankrupt, " now in profecution, is awarded and issued, was " before the date and fuing forth John Fenskawe. " of the faid commission, and " ftill is justly and truly indebted " unto him this examinant in the fum of 300l. for " goods fold and delivered by this examinant, to " the faid Francis Gibbons, before he became bankrupt, for which faid fum of 300% or any part thereof, this examinant hath not received any " fecurity or fatisfaction what-Champion Branfil. " ever." Charles Jones.

For a deposition of trading, see fol. 284. and act of bankruptcy, fol. 290.

## For divers sums of money.

#### At, &c.

" John Leigh of, &c. being Thomas Nugent. " fworn and examined, the day " and year, and at the place above faid, before, &c. " upon his oath faith, that Francis Gibbons of, &c. "the person against whom the commission of " bankrupt now in profecution, is awarded and if-" fued, was before the date and fuing forth of the " faid commission, and still is, justly and truly in-" debted unto him this examinant, in the fum of " 70% for monies had and received " by the faid bankrupt, to and Richard Wood. " for the use, and on the ac-" compt of him this examinant; and also in the " further fum of 101. for money lent the faid Tho.

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bankrupt

the further sum of 12l. for money paid by this examinant, to and for the use of the said bank rupt, and by his order; which said several sums of money were received by, lent to, and paid for the said Francis Gibbons, before he became bank rupt, for which or any of them, or any part there of, this examinant hath not had, or received, any security or satisfaction. Thomas Life.

#### Administratrix.

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## At, &c.

" Mary Combes of, &c. widow Thomas Nugent. " and administratrix of all and " fingular the goods and chattels, rights, and " credits, which were of James Combes her late " husband deceased, at the time of his death, be-" ing fworn, &c. (as above) and still is indebted " to this examinant in the fum " of 100 l. for goods fold and Richard Wood. " delivered by the faid James " Combes in his life-time, to the faid Francis Gib. " bons, before he became bankrupt, for which " faid fum of 100% or any part thereof, this exa-" minant hath not received, (nor did her faid late " husband in his life-time, to her knowledge or " belief receive) any fecurity or fa-Thomas Life. " tisfaction." " Mary Combes."

## Assignee (a) of a bankrupt.

## At, &c.

Thomas Nugent. "Abraham Bentley of, &c. one of the affiguees of the effate and effects of Rowland Rofs of, &c. bankrupt,

(a) See fol. 97.

Q 5

" &c. (as before) and still is justly and truly in-" debted unto him this deponent and to John " Mirth of, &c. affignees to the estate and ef-" fects of the faid Rowland Rofs, in the fum of " 50 l. for goods fold and deli-" vered to the faid Francis Gib-Richard Wood. " bons before he became bank-" rupt, by the faid Rowland Ross, before he became bankrupt, as appears to this examinant, " by the books of accompt of the faid bankrupt, " now in the custody or power of this exami-" nant, and the faid John Mirth, or one of them, " for which faid fum of 50 %. or any part thereof, 45 this examinant (nor the faid John Mirth to the "knowledge or belief of this examinant) hath " received any manner of fecu-Thomas Life. " rity or fatisfaction whatfo-" ever."

Abraham Bentley.

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The usual deposition on this occasion is, "By a bankrupt on behalf of his affignee;" now we apprehend that such deposition is improper, because the bankrupt may happen to have received the debt fince his bankruptcy; and if fo, the debtor might be obliged to repay or refund it to the affignees, yet fure it would be such a payment to the bankrupt, as to make him object to swear " that he had not received the same, or any part " thereof, or any fecurity or fatisfaction what soever." And according to this doctrine, the bankrupt must either in some cases be perjured, or his creditors lose part of his estate and effects. What gave rife to the bankrupt's making fuch deposition, feems to have been, because it was necessary, for him to swear to the debt at law, but that was for this particular reason, because his debtor could not be held to bail (or arrested) unless the bankrup:

rupt himself made affidavit of the debt; a positive oath being required to deprive a man of his liberty, but as the liberty of the subject is not affected by a deposition of debt under a commission of bankrupt, there is no occasion for such oath. Therefore we decline making a precedent of " A depofition by a bankrupt on behalf of his affignee."

## Assignce of a (a) debt.

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#### At, &c.

" James Welsh of, &c. and John Fenshawe. " Miles Crouch of, &c. being " feverally fworn and examined, the day and year, and at the place abovefaid, upon their oaths fe-" verally fay; and first this examinant James " Welfh for himself saith, that Francis Gibbons of, " &c. the person against whom the commission of " bankrupt now in profecution is awarded and " iffued, was before the date and fuing forth of " the faid commission, and still is justly and truly " indebted unto him this examinant, in the fum " of 30 l. by virtue of a certain indenture of " affignment, duly executed by Champion Branfil. " the faid Miles Crouch to this " examinant, dated the " of June 1768, of one (b) debt or sum of 30 1. " due and owing to the faid Miles Crouch, from " the said Francis Gibbons, before he become bank-

<sup>(</sup>a) See fol. 98.

<sup>(</sup>b) If the creditor is the affiguree of a bond you say here, " of " one bond or obligation, entered into by the faid bankrupt un'o " the faid Miles Croueb, in the penal fum of with con-

<sup>&</sup>quot;dition, for payment, by the faid bankrupt, to the faid Miles "Crouch, the fum of [the money due], with lawful in-"Crouch, the fum of [the money due], with lawful in-

Q.6 " rupt,

" rupt, and both these examinants say that they have not, nor hath either of them, to the know-

" ledge or belief of the other of them, received any 
fecurity or fatisfaction whatfoever, for the faid 
fum of 301. or any part there-

Richard Wood . " of."

James Welsh. Miles Crouch.

Ric

Tbo

#### Attorney (a).

#### At, &c.

Thomas Nugent. "Edward Smith of, &c. [as "usual to] and still is justly indebted unto him this examinant in the sum of 
40 l. for the attendance, (b) fees, and monies 
laid out and expended by him this examinant 
in and about the affairs and business of the said 
Francis Gibbons, before he beChampion Bransil. "came bankrupt, for which said 
fum, &c. [as usual] save a 
for 20 l. payable to the bankrupt, and indorsed 
by him to this examinant, and also save and 
except, that he this examinant has brought an 
action for the said debt in his majesty's court of 
King's Bench, at Westminster, wherein bail has

Edward Smith.

" been put in above for the faid

(a) See fol. 100.

Richard Wood.

" bankrupt.".

<sup>(</sup>b) We apprehend that under commissions of bankrupt, an attorney or solicitor is not obliged to deliver a bill, or to submit to a taxation: See Rayn. Read. on Stat. Geo. II. 71. The courts at law have determined that the act for their regulation does not extend to their executors or administrators. Comb. 348. Barnes's Notes C. P. 91. Andr. 276. 2 Stra. 1056. We would not be understood to include the clerk of the commission's bill of fees in this observation.

## On Bill of Exchange.

#### At, &c.

John Fenshawe.

" Robert Bond, of, &c. [as ufual]

" and still is justly and truly in-

" nant in the fum of 40% by

" virtue of a bill of exchange

" drawn by the faid Francis Gib-

" bons, before he became bank-

" rupt, on the day of last,

" upon Charles Dingley, for pay-

Richard Wood.

" ment of the faid fum of 40%.

" fix days after date, for value

" received of this examinant, for which faid fum of 401. &c.

" [as usual] fave and except the

" faid bill of exchange, and two

" more bills of the like effect,

" and the protests for non-ac-

" ceptance and non-payment of

" the faid bill."

Robert Bond.

#### On Bond.

#### At, &c.

John Fenshawe.

Thomas Life.

" Peter Saintbill of, &c. [as usual

to in the fum of 1000 L for

" principal and interest due to this examinant, by virtue of

" one bond or obligation bear-

Champion Branfil." ing date the day of

under the hand

" and feal of the faid Francis Gib-

bons, before he became bankrupt,

" for which said sum, &c. [as usual] save and except the said

Richard Wood. "bond or obligation."

Peter Sainthill.

Or thus,

#### At, &c.

Edward Ironfide of London, Esquire, being " fworn and examined the day and year, and at "the place above-mentioned, before the major " part of the commissioners named and authorized in and by a commission of bankrupt awarded " and issued, and now in prosecution against Franes cis Gibbons of, &c. upon his oath faith, that the " faid Francis Gibbons was before the date and fuing forth of the faid commission, and still is " juftly and truly indebted to this examinant, in the fum of 500 f. for fo much money lent and advanced by this examinant to the faid Francis "Gibbons before he became bankrupt, and also in " the further fum of 175 L. for interest due thereon before the time aforefaid, making together " the sum of 675 £. for which, or any part there-" of, this examinant hath not received any fecurity or satisfaction whatsoever, save and except a cerstain bond or obligation, dated the which was in the year of our " Lord 1763, under the hands and seals of John 4 Johnson, of London, Esquire, Charles Cole of Twicke enham, in the county of Middlesex, gentleman, and the faid bankrupt, by the name and description of Francis Gibbons of London, merchant, in the penalty of 1000 f. conditioned for the payment of 500 f. and interest, on the ee day of next enfuing the date " of the faid bond or obligation."

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## Country creditors.

The debts of the country creditors must be proved by affidavits sworn before a master extraordinary of the court of Chancery, in the country, and produced and exhibited to the commissioners, at one of their sittings in London. They should be the same in substance as depositions, otherwise they will be rejected, but their forms must be altered; the addition and description of the bankrupt in the commission must be exactly set forth in the affidavits, otherwise they will not be admitted.

If the creditor has any fecurity for his debt, he must annex it to, or fet it out in his affidavit, and

" also save and except it therein.

#### On Decree.

#### At, &c.

Thomas Nugent.

John Fenshawe.

Richard Wood.

" Charles Meriton of, &c. [29

" truly indebted unto him this ex-

" aminant in the fum of 500 l.

decreed to this examinant by a

" decree of the high court of Chan-

" now last past, pronounced be-

" fore the faid Francis Gibbons be-

" came bankrupt, in a cause de-

e pending in the faid court,

wherein he this examinant is

complainant, and the faid

" bankrupt is defendant; for which said sum, &c. [ as

" ufual.]"

Charles Meriton.

Executor

#### Executor (a).

#### At, &c.

Thomas Nugent.

"John James of, &c. executor

of the last will and testament of

Nicholas Bradshaw, late of, &c.

deceased, being sworn, &c. [as

usual] for which said sum of,

which said sum of,

a warrant of attorney dated the

day of June 1768, for

confessing judgment on a mutu
atus in his majesty's court of

Richard Wood.

## Creditor (b) by judgment.

" Common Pleas at Westminster."

John James.

#### At, &c.

"George Welp, of, &c. Joseph "Milner, of, &c. Mary Jupp, "of, &c. [as usual] and still is justly and truly indebted unto these examinants, in the sum of 850 l. of lawful money of Great Britain, before he became bankrupt, for damages and (c) costs recovered by these examinants, in his majesty's court of King's Bench at Westminster, in or about "Easter term last, against the said Champion Bransil. "bankrupt, in an action upon the case, for promises, for which

(a) See fol. 122. (b) See fol. 125.

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<sup>(</sup>c) If the judgment is interlocutory only, the commissioners will not allow the plaintiff to add costs to his debt. See fol. 148.

" faid fum of 850 l. or any part thereof, these ex-

" aminants have not, nor hath any of them, to " the knowledge or belief of the other of them, re-

" ceived any fatisfaction or fecurity whatfoever,

" fave and except the faid judgment, in the faid

" court of King's Bench, figned on or about the " feventh day of June 1768, and

Richard Wood. " entered on the roll 862.

George Welp. Toleph Milner. Mary Jupp.

If the judgment be on a writ of inquiry, the (a) inquisition must be exhibited; if on a verdict, the (a) Postea; if on a confession, the judgment paper is to be exhibited; but lord Hardwicke (b) feems to think that a copy of the judgment itself ought to be produced; if so, it must be on treble fix-penny framped paper, and examined by the original record, for which purpose you must apply, if it be a judgment in B. R. to Mr. Wallis, at his office, No. 12, Holborn Court, Gray's Inn ; if it be a judgment of C. B. you must apply to Mr. Stubbs, clerk of the treasury, at his house in Old Palace Yard, Westminster.

#### Mortgagee (c).

## At, &c.

John Fenshawe.

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" Fames Strange of, &c. [ as " usual] save and except one in-" denture of mortgage, bearing

<sup>(</sup>a) This must be understood of B. R. for in C. B. the prothonstory keeps it in order to deliver it over to the clerk of the judgments, which is not afterwards to be taken out of the office, without leave of the court. Reg. C. B. Trin. 13 Ges. 2.
(a) Atk. Rep. 83.

<sup>(</sup>c) See fol. 131.

elab.

#### Firft Sitting

The second second	" date the day of June
The state of the	" 1768, for the payment of 4201.
Distribution to	on the 22d day of August 1768.
Richard Wood.	" which faid mortgage this ex-
All acceptance in	" aminant doth agree or affign,
ult mode to	" and doth hereby furrender and
In dotrini	" give up for the benefit of the
185%	" creditors claiming or feeking
	" relief under the faid commis-
Thomas Life.	" fion." Jonas Strong.

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## On note of hand.

#### At, &c.

Million by the control of the contro
Thomas Nugent. " E. B. of, &c. being fworn &c. [as ufual] and still is justly
" and truly indebted to this examinant, in the
66 fum of 890 l. and upwards, for money lent by
" this examinant to the faid Francis Gibbons, before
66 he became bankrupt, for which faid fum of
8901. or any part thereof, this examinant hath
" not received any fatisfaction or fecurity whatfo-
" ever, fave the feven following promifory notes;
" one dated the 22th of May 1767, under the hand
of the said Francis Gibbons, whereby he promises
to pay to this examinant, or order, one year af-
" ter date, 200 l. with (a) inte-
Champion Branfil. " terest; the other fix promisory notes are under the hand of
" one A. F. and made payable to the faid Francis
" Gibbons, and by the faid Francis Gibbons indorfed
" (b) to this examinant, and are for the several and
and This and be enter fined at I I for an C. W. the art been
(a) Interest is not allowable in bankrupt cases, unless it be expresly

mentioned in the body of the note. See fol. 168.

(b) An indorfed note may be proved under the feveral commissions, until the party is satisfied his whole debts. See fol. 101, 102.

respective

E. B.

respective sums sollowing; one dated 19 September 1766, for 150 l. payable six months after date;
another dated 18th October 1766, for 90 l. payable six months after date; another 8th November, 1766, for 100 l. payable sour months after
date; another dated 4th December 1766, for 115 l.
payable sive months after date; and the other
of the said notes dated 26th of
Richard Wood. December 1766, for 125 l. payable six months after date.

was and the

At, &c.

By partners.

" James Lalley of, &c. [as usual] Thomas Nugent. " and still is justly and truly in-" debted unto him this examinant, " and George Adams his partner in " trade, in the fum of 20% for " goods fold and delivered by this " examinant, and the faid George " Adams in partnership as afore-John Fenshawe. " faid, to the faid Francis Gibbons, " before he became bankrupt, for " which faid fum of 20 L or any " part thereof, this examinant " hath not, nor hath his partner, " to his knowledge or belief, reof ceived any security or satisfac-" ton whatsoever." Fames Lally.

Upon a policy of insurance.

" John Wilkes of London, Esq. one of the managers, owners, and agents, of the Liberty privateer, " teer, being fworn, &c. [as ufual] and still is just-" ly and truly indebted unto him this examinant and others, the owners, captains, officers and " crews of the faid privateer, in the fum of two " hundred and twenty-nine pounds ten shillings, "by virtue of a policy of infurance made out in " the names of Charles Church and John Lloyd, late of London, merchants, fince deceased (who were two other of the managers, owners, and agents of the faid privateer) and subscribed by the faid Francis Gibbons, on or about the 11th day of July 1768, before he became bankrupt, for the fum 66 of three hundred pounds upon goods loaden or to be loaden on board the ship La Bute, a prize taken by the faid privateer, but not condemned, " James Martin, master, for a voyage at and from " Scotland, a port in Europe, in the possession of the crown of Great Britain to London, at 5 l. per cent. premium, and in case of loss to abate two co pounds per cent. and by the faid policy it was and is agreed, that the faid goods and merchandizes " should be valued at one hundred and fifty pounds, " and no other or further proof of interest should 66 be required than the faid policy. And the affu-" rers thereby agreed that the production of the 66 faid policy should be a sufficient proof, not only of the amount or value of the interest as therein before agreed, but also of the property of the af-" fured in the faid goods, though not condemned, without any other evidence what soever: and it was and is by the faid policy further agreed, that " in case the ship and cargo were or should be dif-" posed of at Scotland, to return four pounds per " cent. warranted to depart with convoy; and this examinant further faith, that the faid ship in the " due profecution of her said voyage for London, " was stranded on the coast of ----, by means whereof

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" whereof an average loss did accrue on the faid " policy, which faid average loss the other underwriters on the 27th day of August 1768, adjusted at feventy-fix pounds ten shillings per cent. to pay in a month by subscribing their names to an in-44 dorfement on the back of the faid policy in the " words and figures following (that is to fay) " London the 27th August 1768, adjusted an average 4 loss on this policy at seventy-fix pounds ten shil-" shillings per cent. to pay in a month." And this " examinant further faith, that the faid Francis Gibbons is indebted to this examinant and the other " owners, officers, captains and crews of the faid " privateer, in the faid fum of 229 1. 10 s. in re-" fpect of the same so adjusted at 761. 40 s. per " cent. as aforesaid average loss; for which said " fum of 229 l. 10 s. or any part thereof, this ex-" aminant hath not, nor did the faid Charles Church " and John Lloyd deceased, or either of them in their " respective life-times, nor hath any other person " or persons for his or either of their use or uses, " or for the use of any other person or persons in-" terested in the faid policy, to the knowledge or " belief of this examinant, had or received any fa-" tisfaction or fecurity whatfoever, fave and ex-" cept the faid policy." John Wilkes.

## Creditor on report in chancery.

#### At, &c.

Thomas Nugent.

" Daniel Goodyer of, &c. [ as usual] and still is justly and truly

" indebted unto him this exami-

" ported due to him from the faid

" Francis Gibbons, by Thomas Cud-

Thomas Life.

## First Sitting.

don, Esq. one of the masters of the high court of Chancery, as

Champion Branfil, "by his report dated the 20th day

" of May last, made in a cause depending in the said court,

" wherein this examinant is com-

" plainant, and the said Francis Gibbons is defendant, may more

" fully appear; for which faid

" fum, &c. [as ufual.]"

Daniel Goodyer.

As the bankrupt appeared and furrendered at the first meeting, there is no occasion to repeat the memorandum thereof, but refer the reader to fol. 327, 328. but if the bankrupt has not yet surrendered, nor does at this sitting, then prepare the following memorandum.

## At, &c.

- " Memorandum, That we, the major part of the commissioners, named and authorized in and by
- a commission of bankrupt awarded and issued,
- and now in profecution against Francis Gibbons,
- of, &c. met the day and year, and at the place bove-mentioned, pursuant to notice in the Lon-
- " don Gazette for that purpose; but the said Fran-
- " cis Gibbons did not surrender himself to us, or
- " make any disclosure or discovery of his estate or
- effects, or fend any excuse why he did not.

Thomas Nugent. John Fenshawe. Champion Branfil.

If neither the bankrupt furrenders, nor any creditor proves or claims a debt at this fitting, which

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commission debtor,

which is not unufua', this memorandum feems proper.

## At, &c.

"Memorandum, that we the major part of the commissioners named and authorized, in and by a commission of bankrupt awarded and issued, against Francis Gibbons, met the day and year, and at the place abovesaid, pursuant to such notice, nor did any creditor prove or claim any

" debt under the faid commission."

Thomas Nugent, Champion Branfil. Richard Wood,

Creditors who may not be able to attend the next fitting, to vote in the choice of affignees, and defirous of making over their votes, to some other person, must execute a deed for that purpose, to the following effect:

## Letter to attorney to vote in the choice of affignees.

"KNOW ALL MEN by these presents, that I Harriot Luther, of, &c. one of the creditors of (a) Francis Gibbons of, &c. against whom a commission of bankrupt under the Great Seal of Great Britain, hath been awarded and issued, HAVE made, ordained, constituted, and appointed; and by these presents do make, ordain, constitute, and appoint George Lucas of, &c. my true and lawful attorney for me, and in my name, place and stead, to appear before the commissioners in

<sup>(</sup>a) The addition of the bankrupt must be exactly as in the commission, otherwise it does not appear that the bankrupt is the debtor, and for this defect therefore the commissioners will reject it.

so and by the faid commission named and authoer rized, or the major part of them, at Guildhall, London, or elsewhere, at the days and times appointed in the London Gazette, for the choice of affignees of the estate and effects of the said Francis Gibbons; and then and there for me, and in my name to confent with whom the monies to be received from time to time out of the faid " bankrupt's eftare and effects, shall remain until 46 the same be divided. And also for me, and in " my name to (a) vote in the choice of one or more " affignee or affignees of the faid bankupt's effate and effects, as my faid attorney, or the commifsi fioners and creditors then present shall think most fit and proper, for the better management, segetting in, recovering and securing of the said " bankrupt's estate and effects. And also in case that I the faid Harriet Luther should happen to be chosen affignee under the faid commission, at " fuch meeting of the creditors of the faid Francis "Gibbons; then as my faid attorney, and for me, and in my name, to accept the faid trust, and to " execute a counter-part of the affignment to the commissioners, and further, to act, do, and perof form, all and whatfoever shall be needful and " requifite to be done in, about, or concerning the premises. And I do hereby ratify, confirm, and allow all, and whatsoever my said attorney shall lawfully do, or cause to be done for me, by vir-"tue of these presents, and of the power and au-"thority hereby to him by me given. In WIT"NESS whereof I the faid Harriet Luther have " hereunto fet my hand and feal this 11th day of

" Me " reig " of

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Affidav

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" nent. " letter " there

(a) On: (b) If tl

must run t faid letter o

per mark o

<sup>(</sup>a) For letter to attorney to fign confent to the commissioners certifying the Great Seal that the bankrupt hath conformed a to confeat to affignees their commencing fuits in equity, &c. and to receive dividends. See fol. May

" May, in the ninth year of the reign of our fovereign lord George the third, &c. and in the year of our Lord 1769."

Harriet Luther, (L. S.)

Sealed and delivered (being first duly (a) stamped) in the presence of

> John James, Thomas Marye.

This letter of attorney must be accompanied with an affidavit of its due execution.

Affidavit of the execution of the above letter of at-

" John James, of maketh oath, that he was present and did see Harriet Luther of,

" &c. duly fign, feal, and as her act and deed de-

" and that the name Harriet (b) Luther subscribed

" against the seal of the said letter of attorney; is the own proper hand-writing of the said Har-

"riet Luther, and that the names of this depo-

" nent, and of Thomas Marye subscribed to the faid

" letter of attorney, as witnesses to the execution thereof, are of this deponent's, and of the said

(a) On a fingle half-crown.

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<sup>(</sup>b) If the party puts her mark instead of her name, the affidavit must run thus: " and that the mark subscribed against the seal of the said letter of attorney, hereunto annexed, thereto set, is the own proper mark of the said Harriet Lutber."

Aleris

Thomas Mayre's own proper respective hands writhoner, prescribed and specified, in and begain 32:

n odt ni belleg bna ebam . ine John James. Sworn at Saint Edmonds (a) Bury, in the county of Suffalk, the 11th day of May, in the year of our Lord 1769, before me,

Nicholas Rowe, master in Chancery (b) extraordinary.

a to the committees. The above letter of attorney and affidavit muft be exhibited. when when ba bailding ad

## Second Sitting at Guildhall.

As some or one of the commissioners may happen to attend this fitting, who did not at either of the former ones, we will here give the proper precedent on fuch an occasion.

Memorandum of the qualifications of two of the commisfioner's who have not acted.

.o. dab a demiel . do At. &c.

as que to fon Minning-Thomas Nugent. " Memorandum, that Richard

men, being two of the commissioners named and authorized, in and by a commission of bankrupt,

awarded and iffued against Francis Gibbons of, &c.

did, before they proceeded to act in the faid comslaim will not be sufficient to intitle him to a share

(a) If the place where the affidavit was fwort, is not inferted in the trary, it might have been taken within cen miles of London, and if

in Chancery, otherwise he will not appear to have any authority to take affidavits in that court.

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noiftim sec fol 174.

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All debts, miffion, respectively take the oath of a commis-

" of parliament, made and passed in the fifth year

" of the reign of his late majesty king George the Second, intituled, " An Act to prevent the com-

" mitting of frauds by bankrupts," according to

" the directions of the said act."

by a committeen of bank

Witness B. R.

Richard Wood. Thomas Life.

Clerk to the commission.

As we have before [ fol. 327, 354. ] given forms of the memorandums, when bankrupt furrenders, or does not, we will not infert them here again, but only observe, that it seems proper always to make a memorandum in either case.

#### (a) Claim.

## At, &c.

Thomas Nugent. " Be it remembered, that James

" Hockaday of, &c. the day and

" year, and at the place above-

Richard Wood. "mentioned, claimed a debt of "100 l. as due to John Winning-

ton of, &c. from Francis Gib-

Thomas Life. bins the faid bankrupt, for goods

". fold and delivered."

## James Hockaday.

The claimant is not sworn, and therefore the claim will not be sufficient to intitle him to a share of the dividend till duly proved.

All the creditors present having proved their debts, they proceed to the choice of affignees, of this choice one of the following memorandums is made.

(a) See fol. 174.

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## od to the chaice of affigures, they directed Memorandum of the choice of affignees.

#### At, &c.

went. " Memorandum, that this be-Thomas Nugent. " ing the day appointed in the

"London Gazette, for the choice of affignees of " the estate and effects of Francis Gibbons of, &c.

" the person against whom the commission of bank-" rupt, now in profecution, is awarded and iffued,

"We, whose names are hereunto written, being

46 the major part in value of the creditors of the " faid Francis Gibbons, prefent at

Richard Wood. " this fitting, and who have proved " our debts to be 10% or up-

wards, have chosen, and do hereby nominate and

" chuse, John Partridge of, &c. and Charles Den-" nis of, &c. to be affignees of the estate and es-

" fects of the faid Francis Gibbons, and we do hereby

defire the commissioners to make an affignment

" thereof to them accordingly.

" We do accept of the faid truft, and promise to execute a Abraham Bently. counter part of the for himself and affignment to the alob bavo John Mirth. commissioners." James Walfb.

(a) John Partridge. John Leigh. Mary Combes.

John Partridge. (a) Charles Dennis. Charles Dennis. George (b) Adams, and anything a sometime of the confer thouses pertilying the .woonis olie vam an bne ; and tompany and durchast ta company.

on to act for the parinerfline.

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their his letter of accorney must author ze him to to do, and allo (a) But he may not happen to be a creditor, for though an affignee generally is, it is not at all necessary. See Atk. Rep. 153. pl. 92.

(b) We apprehend that though this person was not the partner who estimally favore to the debt, that yet he has a legal right to fign this

" Memorandum, That before the creditors pro-" ceeded to the choice of affignees, they directed

" that the monies to be received

Thomas Life. " from time to time, as often as " they amounted to the fum of

" 100 % or upwards, should be paid into the hands of Sir Richard Glyn, Bart, and company, bankers,

" in Lombard-Areet, London."

Memorandum of the choice by one creditor only, and that by power of attorney.

## At, &c.

Thomas Nugent. Be it remembered, that this

being the day appointed in the

" London Gazette, by the major part of the com-" missioners named and authorized, in and by a

" commission of bankrupt awarded and issued, and

" now in profecution against Francis Gibbons of, &c.

" for the choice of one or more affignee or affig-

" nees of the faid bankrupt's estate and effects; " Samson Bond, by virtue of a let-

" ter of attorney, dated 20th of Richard Wood.

" May now last past, from Jonas " Strong, who hath duly proved a debt of 10% or

" upwards under the faid commission, and is the

" major part in value of the creditors now prefent,

" who have proved debts under the faid commission, " doth nominate, elect, and chuse William (a)

" Twift to be sole affignee of the estate and effects

choice, and also to fign confent to the commissioners certifying the Great Seal, that bankrupt has conformed; and he may also empower a person to act for the partnership.

(a) The attorney may, we apprehend, chuse his principal assignee, but then his letter of attorney must author ze him so to do, and also to accept the trust for the principal. See fol, 118 - Note (6).

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ho his ce,

- 46 of the faid bankrupt, and doth defire the faid
  - to spinds set "commissioners to make an af-
- " fignment to the faid William Thomas Life. " Twift accordingly."

Samfon Bond.

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"I do accept, &c. William Twift." on Linds doi no steel

nowards, under me laid

Memorandum of only one creditor, his voting in the shoice of assgnees.

# raid choice until I bir ship (a)

Thomas Nugent.

- " Be it remembered, &c. fas be-" fore I Luke Cleave who have
- angle land or es proved a debt of 101. or up-
  - " wards, under the faid commis-
  - es fion, and am the major part in
- -34 38 shart ee value of the creditors now pre-
- lo ,namelines et fent, who have proved debis
- Richard Wood. " under the faid commission, do
  - nominate, &c. myself sole al-
- the bas bome to figure of the faid bankrupt's
- effate and effects, and do defire
- maintenance of the faid commissioners to make
- brood and to et an affignment thereof to me ac-
- Thomas Life. cordingly." Luke Cleave.

" ORober

CI do accept, &c. ) ad rabau noillimmon a vila Luke Cleave, "srevel and nogu tehmong wester

If it should happen that no creditor of fufficient value, attends this fitting, the choice it feems must be adjourned to some suture day, of which due notice must be given in the Gazette to belinger ed of (4)

and now in force concerning bankrupts, bearing

Memo-

#### Memorandum of the adjournment of the choice of affignees.

" of the faid bankrupr, and doth defire the fa

#### At, &c.

" Be it remembered, &c. [as before to " and ef-" fects" in fol. 361.] no creditor, who had " proved a debt of 10% or upwards, under the faid " commission, voted in the choice of one or more " affignee or affignees of the faid bankrupt's effate " and effects; we therefore do hereby adjourn the " faid choice until Thursday the (a) next, at ten o'clock in the forese day of " noon, at Guildball, London."

#### Assignment (b) to offignees, ofter a provisional offignlimmos bial and tohn ment.

THIS INDENTURE tripartite, made, &c. BE-TWEEN William Chessbyre of, &c. gentleman, of " the first part; Thomas Nugent, John Fensbawe, " Esquires, and Champion Branfil, gentleman, the "major part of the commissioners named and au-" thorized in and by a commission of bankrupt, " awarded and iffued, and now in profecution " against Prancis Gibbons of, &c. of the second " part; John Partridge of, &c. and Charles Dennis. " of, &c. of the third part. WHEREAS his ma-" jefty's commission under the Great Seal of Great " Britain, grounded upon the several statutes made " and now in force concerning bankrupts, bearing " date at Westminster, the dis rouged bloom day of

(b) To be engroffed on a fingle 2 s. 6 d. stampt skin of parchant

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<sup>(</sup>a) Seven days notice at least should be given in the Genete of this adjournment, and the cause thereof.

October in the year of our Lord 1768, hath been awarded and iffued against the said Francis Gib-bons, and directed to Thomas Nugent, John Fen-Shawe, Champion Branfil, Esquires, Richard Wood and Thomas Life, gentlemen, thereby giving full " power and authority to the faid commissioners, four or three of them, to execute the same com-" mission, as by the same commission, relation being thereunto had, more fully and at large it doth and may appear. AND WHEREAS upon " the execution of the faid commission, it appeared " to the major part of the commissioners, in the " faid commission authorized, upon due examination of witnesses, and other sufficient proof up-" on oath, that the faid Francis Gibbons did, frm the month of Fanuary 1760, carry on the trade " and business of a merchant, by exporting and importing divers kind of goods, and did by fuch " trade and bufiness seek and endeavour to get his " living, as other merchants usually do, and in the course of his said trading and dealing, he became " indebted unto Charles Jones of, &c. in the fum " of 100 % and upwards, for goods fold and deli-" vered. AND WHEREAS the faid Francis Gibbons " did, in the judgment of the major part of the " faid commissioners, become bankrupt to all in-" tents and purposes, within the compass, true " intent and meaning of the several statutes made, and now in force concerning bankrupts, or within some or one of them, before the date and suing forth of the faid commission, and they did " adjudge and declare him bankrupt accordingly. " AND WHEREAS the faid commissioners, parties to these presents, in further execution of the said commission, and of the statutes therein mens tioned, and by virtue of the same, by indenture 6 bearing ce bes

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to bearing (a) date the day of " and made or mentioned to be made between the " faid Thomas Nugent, John Fenshawe, and Champion " Branfil, of the one part, and the faid William " Chessbyre, of the other part, reciting as herein " before recited. AND ALSO RECITING, that the " faid commissioners, parties thereto, in further ex-" ecution of the faid commission, and of the sta-" tutes therein mentioned, had also found out and " discovered, or it otherwise appeared to them, that " the faid Francis Gibbons at the time he became " bankrupt as aforefaid, or afterwards, was pol-" fessed of, interested in, or well intitled unto sun-" dry goods, wares, chattels, merchandizes, flock " in trade, houshold stuff, implements of houshold, " bedding, plate, linen, and other things, and " that there were also divers debts, sum and sums " of money, due and owing unto the faid Francis "Gibbons, and his estate, from several persons. " AND ALSO FURTHER RECITING, that the faid " commissioners, parties thereto, thought it ne-" ceffary, for the better preferving and securing the " estate of the said Francis Gibbons, to appoint an " affignee provisionally of his estate and effects, " until choice should be made, by the major part " in value of the creditors, of an affignce or af-" fignees of the estate and effects of the faid bank-" rupt, pursuant to notice to be given in the Lon-" don Gazette for that purpole. IT WAS WIT-" NESSED, that the faid commissioners, parties " thereto, for the confiderations therein mentioned, " DID thereby appoint the faid William Chessbyre, " affignee of the estate and effects of the faid Fran-" cis Gibbons, and DID ALSO, as much as in them " lay, and they lawfully might, order, bargain, therein me

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<sup>(</sup>a) Date of the provisional affignment, in fol. 332.

fell, dispose, affign, and set over, unto the said William Chessbyre, his executors, administrators, and assigns, all and singular the goods, wares, and merchandizes, chattels, stock in trade, debis, se fum and fums of money, and all other the perfonal estate whatsoever of the said Francis Gibbons, of which he was possessed, or intitled unto, or which any other person or persons was or were offested, IN TRUST for him at the time he be-" came bankrupt, or at any time fince, TO HOLD, se alk, demand, sue for, recover, levy, and receive " all and fingular the premises thereby affigned, or " mentioned, or intended fo to be, unto the faid William Cheisbyre, his executors, administrators, " or assigns, IN TRUST for the immediate pre-" fervation thereof, and to and for the ufe, bene-" fit, and advantage of all the creditors of the faid " Francis Gibbons, who had then fought, or should then after in due time, come in and feek relief " under the faid commission, according to the fe-" veral flatutes therein mentioned, or some or one " of them, and to and for no other use, trust, intent, or purpose whatsoever, as in and by the 4 faid recited indenture, relation being thereunto es had, will and may more fully and at large apopear. AND WHEREAS the faid William Chef-" flyre, did in and by the faid recited indenture of " affignment, covenant and agree to and with the faid commissioners, parties thereto, their exsecutors and administrators, and to and with every of them, that he the fald William Chessbyre, his executors or administrators, or some or one of them, should or would, as foon as an affignee or affignees of the estate and effects of the faid bankrupt, should be duly chosen and appointed, " join with the major part of the commissioners authorized by the faid commission, in alligning

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" all and fingular the faid goods, chattels, debts, " fum and fums of money, wares and merchan-"dizes, and all other the premiles, in the faid re-" cited indenture alligned to him, unto fuch per-" fon or persons, as should be duly chosen and "appointed to be the affignee or affignees of the " estate and effects of the said bankrupt; and that " he the faid William Chessbyre would deliver up all " the estate and effects of the said bankrupt, as " should or might have come to his hands or pof-" fellion, or to the hands or polletion of any " other person or persons, as should be duly chosen " affignee or affignees of the estate and effects of " the faid bankrupt, or otherwife, as the faid com-" missioners should direct or appoint, as in and by " the faid recited indenture may more fully and at " large appear. AND WHEREAS at a meeting of "the major part of the commissioners, in and by " the faid commission named and authorized, at " the Guildhall of the city of London, this "day of pursuant to notice in the London "Guzette, for that purpose given, the major part " in value of the creditors of the faid Francis Gib-" bons then present, and who had proved their " debts under the faid commission, and whose debts " respectively amounted to ten pounds or upwards, " did nominate, elect, and chuse the said John " Partridge and Charles Dennis to be affignees of " the estate and effects of the said Francis Gibbons, " and defired an affignment thereof to be made to " them accordingly, by the faid William Coessbyre, " and the faid commissioners: Now THIS INDEN-"TURE WITNESSETH, that the faid William Chef-" shyre for and in consideration of the sum of 10s. "of lawful money of Great Britain, to him in "Rand paid by the faid John Partridge and Charles " Dennis, at or before the fealing and delivery of

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these presents, in pursuance of the above mentioned covenant in the above recited indenture mentioned, by the confent and direction of the " faid commissioners, parties to these presents, telse tified by their being parties to, and fealing and delivering hereof, HATH ordered, bargained, fold, disposed, affigned and set over, and by " thefe presents DOTH order, bargain, sell, dispose, affign and fet over, unto the faid John Partridge 44 and Charles Dennis, their executors and adminifrators, all and fingular the goods, wares and " chattels, debts, fum and fums of money, and all other the personal estate whatsoever of the faid Francis Gibbons, of which he was possessed, or intitled unto, or which any other person or of persons was or were possessed, in TRUST for him. 44 at the time he became bankrupt, or at any time " fince ; AND ALL the right, title, interest, proor perty, claim, and demand whatfoever, of him the faid William Chessbyre, of, in, or to the same, or any part thereof, as affignee of the estate and effects of the faid Francis Gibbons. AND the faid commissioners, parties to these presents, being the major part of the faid commissioners, in and by the faid commission named and authorized, in confideration of 5s. to them or one of them, in hand also paid by the faid John Partridge and " Charles Dennis, HAVE ratified and confirmed, and by these presents Do, as much as in them " lieth, and they lawfully may ratify and confirm unto the faid John Partridge and Charles Dennis, " all and fingular the faid goods, wares, and chat-" tels, debts, fum and fums of money, and other things, and all the estate whatsoever and wherefoever, of or belonging to the faid Francis Gibbons, herein before ordered, bargained, fold, difof posed, assigned, and set over by the faid William Chessbyre,

" Chesfore, party hereto; TO HAVE AND TO HOLD, " alk, demand, fue for, recover, levy, and receive " the faid goods, wares, and chattels, debts, fum " and fums of money, and other things, and all " other the effects whatfoever of or belonging to " the said Francis Gibbons, hereby ordered, bar-" gained, fold, disposed, affigned and set over, or " hereby mentioned or intended to to be, unto the " faid John Partridge and Charles Dennis, their ex-" ecutors, administrators, and affigns, UPON "TRUST NEVERTHELESS (that is to fay) to and " for the use, benefit, and advantage, of all the " creditors of the faid Francis Gibbons, who have " already fought, or shall hereafter in due time " come in and feek relief by virtue of the faid " commission, according to the limitations and di-" rections of the several statutes in that behalf made " and provided, and to and for no other use, in-" tent, or purpose whatsoever; AND the said John " Partridge and Charles Dennis do for themselves, " feverally and respectively, and for their several " and respective heirs, executors, and administra-" tors, and not the one for the other of them, or " for his act or deed, but each for himself sepa-" rately, and for his own separate act and deed on-" ly (a), covenant, promife and agree, to and with " the faid commissioners, parties to these presents, " and to and with every of them, by these pre-" fents, that they the faid John Partridge and " Charles Dennis, their executors, administrators, " and affigns, shall and will with all convenient " speed, by all lawful and equitable ways and means, use their utmost endeavours to recover " and get in the feveral goods, wares and chattels, uging to sine faid Francis Gib

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<sup>(</sup>a) Affiguees expressly covenant to answer only severally. Mossy

debts, fum and fums of money, and all the estate and effects of the faid Francis Gibbons, and after of poffession had and obtained of the said goods, wares and chattels, debts, sum and sums of money, estate and effects whatsoever, or any part thereof, shall and will sell and dispose of the same, to and for the most money and best or price they can get for the fame; AND FURTHER, that the faid John Partridge and Charles Dennis, their executors, administrators, and affigns, shall and will from time to time, and at all times hereafter, upon reasonable request or notice to them se given for that purpole, render and give unto the faid commissioners, parties to these presents, or the major part of the faid commissioners, in and by the faid commission named and authoer rized, and the major part of the commissioners to be named in and by any renewed commission, which may be awarded against the said Francis & Gibbons, at such time and place as they shall appoint, a true, just, and perfect accompt in writ-" ing under the hands of the faid John Partridge and Charles Dennis, their executors, and admiof miltrators, of what and how much money and cother satisfaction, they the said John Partridge and Charles Dennis, their executors or adminifirators, shall have had, recovered, and received, by virtue or means of this present deed of affign-"ment, or otherwise, out of the estate and effects of the faid Francis Gibbons, and fuch money or other satisfaction, as upon such accompt shall appear to be had, raised and received, by the said John Partridge and Charles Dennis, their executors or administrators, they the faid John Par-" tridge and Charles Dennis, their executors or administrators, shall and will well and truly pay or s cause to be paid unto them the faid commissi fioners,

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" fioners, parties to these presents, or the major part of the faid commissioners in and by the faid commission named, or to the commissioners to " be named in any fuch renewed commission, or "the major part of them, or to fuch person or per-" fons as they shall appoint, to the end the same or other fatisfaction may be by them the faid " commissioners, in and by the said commission " named and authorized, or the major part of them, ordered, disposed, distributed, and divided, unto " and amongst all and every the creditors of the " faid Francis Gibbons, who have already fought, or shall hereafter in due time come in, and feek " relief by virtue of the faid commission, accord-" ing to the limitations and directions of the feve-" ral flatutes therein mentioned, proportionably " according to the feveral debts, owing to them " feverally and respectively from the said Francis " Gibbons. AND LASTLY, the faid John Partridge " and Charles Dennis do hereby for themselves se-" verally and respectively, and for their several and " respective heirs, executors, and administrators, " and not the one for the other of them, or for his " act or deed, but each for himself separately, and " for his own separate act and deed only (a), covenant, promise, and agree, to and with the said "commissioners, parties to these presents, and to " and with every of them, their heirs, executors, " and administrators, that they the said John " Partridge and Charles Dennis, their executors and "administrators, shall and will from time to time, " and at all times hereafter, well and fufficiently " fave, defend, keep harmles and indemnified, " the faid commissioners, in and by the faid com-" mission named and authorized, or in and by any

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<sup>(4)</sup> See fol, 369, in Notes. Atl. Rep. 90.

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renewed commission to be named and authorized, and also the said William Chessbyre their messengers, agents, servants, executors, and administrators, and every of them, their and every of their bodies, lands, tenements, goods, and chattels of, touching, or concerning all and all manner of action and actions, suits, arrests, troubles, costs, damages, and expences whatsoever, which they or any of them shall sustain or be put unto, for or by reason of this present deed of assignment, or any other act or acts, thing or things, lawfully done or executed by virtue of the said commission or the said recited assignment, or their or any of their lawful intermeddling in any of the estate or effects of the said Francis Gibbons, IN WITNESS, &c.

# Affigument of bankrupt's estate to assignces, where no provisional assignment had been previously made.

\* THIS INDENTURE made the, &c. BETWEEN Thomas Nugent, John Fenshawe, and Champion 66 Branfil, Esquires, of the one part; and John " Partridge of, &c. and Charles Dennis of, &c. of the other part; WHEREAS his majesty's com-" mission under the Great Seal of Great Britain, er grounded upon the feveral statutes made and now " in force concerning bankrupts, bearing date at Westminster the day of October, in the year of our Lord 1768, hath been awarded and if-" fued against Francis Gibbons, and directed to Thomas Nugent, John Fenshawe, Champion Branfil, El-" quires, Richard Wood and Thomas Life gentle. er men, thereby giving full power and authority se to the faid commissioners, four or three of them, to execute the same commission, as by the same -moon? of frauds by bankrupis," nominate and miffion, relation being thereunto had, more fully " and at large it doth and may appear. AND " WHEREAS upon the execution of the faid com-" miffion, it appeared to the major part of the commissioners in the faid commission authorized, " upon due examination of witneffes, and other " fufficient proof upon oath, that the faid Francis " Gibbons did from the month of January 1760, " carry on the trade and bufiness of a merchant, " by buying and felling, and by exporting and " importing divers kind of goods, did by fuch " trade and bufiness seek and endeavour to get his " living, as other merchants usually do, and in " the course of his faid trading and dealing, he " became indebted unto Charles Jones of, &c. in " the fum of 100 l. and upwards, for goods fold " and delivered. AND WHEREAS the faid Francis " Gibbons did, in the judgment of the major part " of the faid come iffioners, become bankrupt to " all intents and purposes, within the compass, " true intent and meaning of the several statutes " made, and now in force concerning bankrupts, " or within some or one of them before the date " and fuing forth of the faid commission, and they " did adjudge and declare him bankrupt accord-" ingly. AND WHEREAS at a meeting at Guild-" ball, London, of the major part of the faid com-" missioners pursuant to notice for that purpole, " given in the London Gazette, the major part of " the creditors in value of the faid Francis Gibbons, " had proved their debts, and whose debts did re-" spectively amount to the sum of 101 or up-" wards, did pursuant to the power and authority " to them given in and by an act of parliament, " passed in the fifth year of his late majesty's " reign, intituled, " An Act to prevent the com-" mitting of frauds by bankrupts," nominate and " chuse

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" chuse the faid John Partridge and Charles Dennis to be affignees of the efface and effects of the faid Francis Gibbons, and did request the commisfioners to make an affignment thereof to him accordingly. Now THIS INDENTURE WITNESS-ETH, that they the faid commissioners, parties to these presents, in pursuance of the faid above " in part recited commission, and of the statutes therein mentioned, and also for and in consideof ration of the fum of five fhillings a-piece to them the faid commissioners, parties hereto, in hand e respectively well and truly paid, before the " ensealing and delivery of these presents, by the " faid John Partridge and Charles Dennis, the receipt whereof is hereby acknowledged, and also of for and in confideration of the covenants herein es after referved and contained on the part and beso half of them the faid John Partridge and Charles 46 Dennis, their executors, administrators, and affigns, to be kept, done, and performed, HAVE ordered, bargained, fold, affigned, and fet over, " and by thefe prefents Do (as much as in them the faid commissioners lies, and they lawfully may) order, bargain, fell, affign, and fet over unto " the faid John Partridge and Charles Dennis, their executors, administrators, and affigns, ALL and ec fingular the goods, wares, merchandizes, debts, 44 fum and fums of money, effate and effects of him the faid Francis Gibbons, whatfoever and " wherefoever, TO HAVE AND TO HOLD, receive, " and enjoy the faid goods, wares, merchandizes, " debts, fum and fums of money, and all other the eftate and effects herein before ordered, bar-" gaine de fold, affigned, and fet over unto them the faid John Partridge and Charles Dennie, their executors, administrators, and affigns, IN TRUST NEVERTHELESS, to and for the use, benefit, and 66 advan-.bongiffs 32

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advantage of themselves, and all and every other the creditors of the faid Francis Gibbons, who " already have, or hereafter shall or may in due time come in, and feek relief under the faid com-" mission, according to the limitations and di rec "tions of the feveral statutes made concerning bankrupts as aforefaid. And they the faid febre Partridge and Charles Dennis, for themselves se-" verally and respectively, and for their several and " respective heirs, executors, and administrators, " and not the one for the other of them, or for his " act or deed, but each for himself separately, and " for his own separate act and deed only (a), do " covenant, promise, grant, and agree to and with " the faid commissioners, parties hereto, and to " and with every of them by these presents, in " manner and form following, that is to fay, that " they the faid John Partridge and Charles Dennis " their executors, administrators, and assigns, shall " and will pay, or cause to be paid, into the hands " of Sir Richard Glyn, Bart. and Co. Bankers, in " Lombard-fireet, London, the monies arising by, " and to be received from time to time out of the " estate and effects of the said Francis Gibbons, as " often as the same shall amount to 100 L or up-" wards. AND ALSO that they the faid John Par-" tridge and Charles Dennis, their executors, admi-" nistrators, or affigns, shall and will, with all con-" venient fpeed, use their best means and endea-" yours, by fuit at law or otherwise, to recover, " receive, and get into his or their hands or pof-" feffion, all and every the goods, chattels, wares, " merchandizes, flock, utenfils, debt and debts, "fum and fums of money, and all other the effate, " effects, things, and other the premiles hereby executors, administrators, and aimens, an reust

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<sup>(4)</sup> See fol. 169, 371. in Note.

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affigned, or intended fo to be, and after possession " had and obtained thereof, shall and will, with "like convenient speed, make fale or disposal " thereof, for the most money and best price, that " may or can be reasonably had and gotten for the " fame. AND ALSO that they the faid John Parf tridge and Charles Dennis, their executors, admi-" niftrators on affigns, and every of them, shall and "will from time to time, and at all times hereof after, upon every reasonable notice or request to him or them given for that purpole, accompt "5 to and with the faid commissioners, parties to " these presents, or the major part of the commis-" fioners in and by the faid commission named and " authorized, or to be named and authorized by " any renewed commission, against the faid Francis "Gibbons, their executors or administrators respec-" tively, at fuch times and places as they shall of from time to time direct and appoint, for and " concerning all fuch monies or other fatisfaction, " as they the faid John Partridge and Charles Den-" mis, their executors, administrators or affigns, " or any of them shall have gotten in, recovered, " received, or raifed by virtue of these presents, or otherwise, by or out of the estate and esfects of the faid Francis Gibbons, hereby affigned, and "all fuch money, or other fatisfaction, as upon " fuch accompt shall appear to have been raised ob-" tained, or received, shall, and will upon reason-" able notice and request, well and sufficiently pay, " or cause the same to be paid in such manner and form, as the major part of the commissioners of named and authorized, in and by the faid com-"million, or to be named and authorized, by any renewed commission, against the staid Francis Gibbons, hall, after deduction of all inecellary Cofts and charges, order and direct To THE dra Hem, of from, and against all and all manf

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GEND that the same may be distributed, divided. ordered and disposed of, proportionably for and 4 towards the payment and fatisfaction of the debts. "due and owing by the faid Francis Gibbons, to " fuch of his creditors, who have already fought, " or shall hereafter in due time come in and seek " relief, under the faid commission, or any re-" newed commission against the said Francis Gibbons, " and duly prove and afcertain their feveral and " respective debts under the same, according to " the limitations and directions of the faid flatute. " AND LASTLY, they the faid John Portridge and " Charles Dennis, for themselves severally and re-" spectively, and for their several and respective " heirs, executors, and administrators, and not " the one for the other of them, or for his act or " deed, but each for himfelf separately, and for " his own separate act and deed only, do further " covenant, promise, and agree, to and with the " commissioners, parties hereto, and to and with " every of them, and their executors and admini-" strators, that they the faid John Partridge and " Charles Dennis, their and each of their executors, "administrators, and affigns, shall and will from " time to time, and at all times hereafter, well "and fufficiently fave, defend, keep harmless and " indemnified, as well the faid commissioners, par-" ties to these presents, in and by the faid commis-"fion named and authorized, as the commissioners " by any renewed commission, to be named and " authorized, their and every of their mellengers, "agents, and fervants, who have been by them or "any of them employed, in or about the execu-"tion of the faid commission; and their, and every "of their heirs, executors, administrators, bodies, " goods, and chattels, lands, tenements, and every " of them, of, from, and against all and all manmages and expences whatfoever, that shall or may at any time or times hereafter arise, happen, or come unto them the said commissioners, or any or either of them, or any or either of their messengers, agents, servants, heirs, executors, or administrators, for, or by reason, or means of this present deed of assignment, or any other act, matter, or thing, by them, or any of them, salawfully acted or done, by virtue of the said recited commission, or any renewed commission; or by their or any of their lawful intermeddling in the estate or effects of the said Francis Gibbons, In witness, &c."

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Schedule to this affignment; but by sect. 42. of that act, there shall be none, See fol. 191.

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Charles Jones, the petitioning creditor of Francis Gibbons, bankrupt, debtor to James Browne, for the costs of suing out and prosecuting a commission of bankrupt against the said Francis Gibbons.

rovigonal amgnment g c	L.	5.	1.
Attending the petitioning creditor for in-	0	6	8
Drawing and engroffing affidavit (a) of debt, duty, and oath	0	6	0
Bond to the Great Seal and duty (b)	0	6	0

(a) If the affidavit is made by feveral creditors, the folicitor is to be allowed more according to the extraordinary length occasions thereby.

(b) This bond is charged by the solicitor as well as by the serve tary of bankrupts, the solicitor hath a right to prepare this bond, but not chusing to litigate the matter with the secretary, nor he with the solicitor, they both agree that their client shall pay for it truice.

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### Second Sitting

A STATE OF THE STA	1.	s.	d.
Ingroffing and counterpart	1	1	0
Parchmen: and duty	.0	8	0
Paid com nissioners executing the same	3	0	0
Solicitor attending.	1	0	0
Paid commissioners signing certificate, that petitioning creditor had proved his debt, in order to see bankrupt prisoner	3	0	0
Solicitor preparing same and attending	1	0	0
Paid commissioners on their first sitting at }	3	0	0
Solicitor preparing depositions and pro-	1	0	0
Paid commissioners on second sitting at }	3	0	0
Solicitor preparing depositions and pro-		0	0
Drawing affignment two skins (being a confirmation of the provisional affignment)	2	2	0
Ingroffing and counterpart -	2	. 2	0
Parchment and stamp	0	16	- 0
Paid commissioners executing the same	3	0	0
Solicitor attending	1	0	0
Drawing bargain and sale, two skins	2	2	0
Ingroffing it in two parts -	2	2	0
Parchment and stamp	0	16	
Paid commissioners executing the fame	3	0	0
Solicitor attending		0	0

It is not to be supposed that the solicitor will ever have occasion to make out such a bill of costs as the above, under one and the same commission,

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it is only offered as a precedent, from which may be taken the proper charges in almost all circumstances which can possibly happen at this stage of the proceedings, the solicitor therefore will make the intended use of it, and remember to put dates where required.

When the bill has been perused and allowed by the commissioners, the solicitor must underwrite the

following order for payment thereon, viz.

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#### At, &c.

### 2d day of June 1767.

We whose names are hereunto subscribed, being the major part of the commissioners named
and authorized, in and by a commission of
bankrupt awarded and issued and now in profesecution, against Francis Gibbons of, &c. having
inspected the above bill of charge and disbursements, do tax and ascertain the same at the sum
of
And we do hereby direct and order
folia Partridge and Charles Dennis, the assignees
of the estate and essects of the said bankrupt, to
pay the sum of
out of the first
monies or essects of the said bankrupt, that shall
be got in and received under the said commission;
Witness our hands the day and year, and at the
splace above mentioned."

Thomas Nugent, Richard Wood,
Thomas Life.

Lord Raymond, chief justice of the court of King's Bench, in an action tried before him, previous to the passing of 2 Geo. 2. c. 23. brought by an actorney, for his bills of fees and disbursements, for

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fuing out and profecuting a commission of bankrupt against the affignees of a bankrupt, declared his opinion to be, upon its coming out in evidence, that the bankrupt's effects were appraised to more than the amount of the attorney's bill; that the plaintiff's demand was clearly good against the asfignees, though the bankrupt effects were not in their actual possession, because they have a right to feize them wherever they can find them (a); but fince the above determination, and fince 2 Geo. 2. c. 23. the legislature hath declared, that the creditor who obtains a commission, shall, at his own costs, prosecute it until assignees be chosen, which the commissioners shall ascertain, and order the asfignees to reimburse out of the first effects received under the commission. See 5 Geo. 2. c. 30. f. 46. A folicitor who carries on fuits in equity for affignees of bankrupt, without authority of the majority in value of his creditors, bankrupt estate not liable to the bill of fees and difbursements for fuch fuits, but the affignees only, and they personally liable (b).

Assignces of plaintist's effects under a commission of bankrupt, moved to have money paid out of court to them, which had been paid therein, on the common rule, whereupon plaintist had proceeded to trial, and recovered a larger sum, and asterwards became bankrupt: this motion was opposed by plaintist's attorney, who submitted, whether he who had been the means of obtaining the verdict, ought not to be paid the bill of sees and disbursements. Rule to refer bill to be taxed; plaintist's attorney to allow monies received by him of plain-

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<sup>(</sup>a) See Reyn. Read on Stat. 2 Geo. 2. ch. 23. feet. 23. (perpetuated by flat. 30 Geo. 2. c. 19. f. 75.) fol. 69.

(b) Tr. Atk. Rep. 210. pl. 116.

tiff in part, and then to be paid out of the monies

in court, the relidue by the affignees (a).

Stat. 2 Geo. 2. ch. 23. fect. 23. does not, in Mr. Rayner's opinion, "extend to or affect the demands of attornies or folicitors, when they come for fatisfaction, in the character of creditors under commissions of bankrupt; for the prohibitory words of the act are, shall not commence or maintain any action or suit; and it hath been determined, that a solicitor may take out a commission of bankrupt for his sees, whilst the bill is under taxation, by order of reference from the court of Chancery, though the order directs, that all proceedings at law shall be stayed. Lord chancellor King (Mose. Rep. 27. pl. 13.) being of opinion, that the prohibitory words of the order, extended only to bringing of actions, and to common and ordinary proceedings.

"If the attorney or folicitor hath not delivered a bill figned to his client, previous to the bank"ruptcy, he must wait fourteen days before he will be able so to do, affignees being feldom chosen sooner; he must also wait a month longer after that, before he can be admitted to prove his debt; by this means he loses the opportunity of objecting to any fraudulent demand, made on the bankrupt estate, and of voting in the choice of affignees, oftentimes privileges of the utmost

" consequence in bankrupt cases.

Besides stat. 2 Geo. 2. c. 23. s. 23. directs, that the whole found due, on the taxation of the bill, be paid, so that the order of taxation cannot be obtained, unless the party applying for the same, do undertake in writing, previous to the granting such order, to pay what shall be reported due.

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<sup>(</sup>a) Barnes, 145. 146.

" As equality among creditors is the very be-all and end-all (in the language of Shakespeare) of the bankrupt laws, how can the affignees fub-" fcribe to the terms of ftat. 2 Geo. 2. c. 23? However, if they do undertake to pay what is due, and afterwards refuse or neglect, they are i liable to an attachment; and if they do comply with their faid undertaking, the commissioners will not allow that item in their accounts, because such allowance is contrary to the express words of the order of dividend; therefore the " affignees in fuch case will be obliged to submit, either to fland committed, or pay perhaps a very confiderable fum of money, out of their own " pockets; how agreeable the alternative! "In fhort, when the reader bath maturely considered the different views with which the " legislature penned 2 Geo. 2. c. 23. and 5 Geo. " 2. c. 30. he will most likely subscribe to our opinion, that there is no distinction to be made between attornies or folicitors, and other credi-" tors, in bankrupt cases; for it is observable, that " the first act was made in order to prevent the creditor imposing upon the debtor, by injoining " him from proceeding to recover his demand, until one month after the delivery of his bill; whereas the other act was made in order to prevent the " debtor impoling upon the creditor, by permitting him to proceed to recover his demand, even before the debt become actually payable, by 5 Geo. 21 c. 30. f. 22 (a)."

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<sup>(</sup>a) The above passages with inverted commas, are all extracted from Royn, Read, on stat. 2 Geo. 2. p. 71, 72, and the state of the stat

#### George Surridge, the Meffenger's Bill on the Commission against Francis Gibbons.

The state of the same and	1.	5.	d.
Summoning and attending the commif- fioners to ——— coffee-house	}.	10	0
Paid for room, pens, ink, and paper	0	3	0
Warrant (a) of feizure, stamp and tin box	0	5	0
Executing (6) warrant at bankrupt's house	0	13	4
Coach or horse hire, what actually paid, if necessary	}	e wi	
Summoning bankrupt to surrender, dupli- cate thereof, and serving same	30	5	
Writing advertisement, and attending Gazette therewith	30	2	6
Paid Gazette	0	12	6
Appraisement of the houshold goods and stock in trade by two (c) persons, and fair copy of inventory			0
Warrant to fummon witnesses, attending commissioners to sign same, writing summonces for the witnesses, and serving them therewith	}.	6	8
Summoning and attending the commif- fioners on their first fitting at Guildball	30	6	8
Paid for hall, pens, &c.	0	3	0
Summoning and attending commissioners at their second sitting	}.	6	8
chain to content		-	

(a) It is the proper business of the folicitor to the commission to prepare this warrant, but he very seldom, if ever, does.

(b) In this charge is included the keeping possession the day the warrant is executed; and for executing the warrant in any other house or place, besides the first, (including the keeping the possession the first day) for each place, 6s. 8d.

(c) For each day they are necessarily employed in appraising fame, to each of them 10s. 6d.

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The boundary of the surviving	1.	s.	d.	
Paid for hall, pens, &c.	0	3	0	
Possession (a) sixteen days, at 5s. each day	4	0	0	
Summoning and attending the commif- fioners at coffee house, to execute assign- ment	ξ.	6	8	
Paid for rooms, pens, &c.	0	3	0	
Same to execute bargain and sale	0	9	8	

There must be proper dates, and the like order of the commissioners for payment, as on the clerk to the commission's bill; mutatis mutandis.

Memorandum of executing assignment, and settling the solicitor's and messenger's bills.

#### At, &c.

"Memorandum, That we, whose names are hereunto subscribed, being the major part of the commissioners, named and authorized, in and by a commission of bankrupt awarded and issued against Francis Gibbons of, &c. met the day and year, and at the place abovementioned, and examined and executed an assignment of the said bankrupt's estate and effects, to John Partridge of, &c. and Charles Dennis of, &c being the assignment of, &c being the assignment of the said commission; and at the same time taxed and settled [or ascertained or allowed] the peti-

(a) And for keeping possession of the bankrupt's effects, in every such other house or place besides the first, for each day after the day of the choice of alligness, including what the messenger pays his man, 31, 4d.

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"tioning creditor's charges and expences of using out and profecuting the faid commission to this time, viz. the folicitor's bill at the sum of and the messenger's bill at the sum of making together the sum of "

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Thomas Nugent. Richard Wood. Thomas Life.

Assignment from the commissioners to new assignees, the former ones being removed (at their own desire) by order, and after a temporary assignment had originally been made.

"This Indenture tripartite, made the day in the ninth year of the reign of our fovereign lord George the third, by the grace of God of Great Britain, France and Irelana, king, desender of the faith, &c. and in the year of our Lord 17. Between John Partridge of and Charles Dennis of of the first part, Thomas Nugent, John Fenshawe, and Champion Branfil, esquires, being the major part of the commisfioners named and authorized in and by a commission of bankrupt, awarded and issued forth against . Francis Gibbons of of the second part, Indrew Finch of of the third part. WHEREAS a Finch of commission of bankrupt under the great feal of Great Britain, bearing date at Westminster, the 17 grounded upon the feveral statutes made, and now in force concerning bankrupts, or fome or one of them, bath been awarded and iffued forth against the faid Francis Gibbons, directed to the faid Thomas Nugent, John Fenshawe, and Champion Branfil, together with Richard Wood and Thomas Life,

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gentlemen,

gentlemen, thereby giving full power and authority to the faid commissioners, four or three of them, nto execute the fame, as in and by the faid commission, relation being thereunto had, doth more fully and at large appear : AND WHEREAS the faid Thomas Nugent, John Fenshawe, and Champion Branfil, being the major part of the faid commissioners in the faid commission named and authorized, having begun to put the faid commission into execution. upon due examination of witnesses, and other good proof upon oath before them had and taken, found, or it otherwise appeared to them, that the faid Francis Gibbons, for several years before the date and fuing forth of the faid commission exercised and followed the trade or business of a merchant, and fought and endeavoured to get his living thereby, as others of the same trade or business usually do; and that he the faid Francis Gibbons, before the date and fuing forth of the faid commission, became indebted to Charles Jones, of in the fum of 1001. and upwards, and being fo indebted, he the faid Francis Gibbons did, in the judgment of the major part of the commissioners in the said commission named, become bankrupt to all intents and purpoles, within the true intent and meaning of the several statutes in the faid commission mentioned, some or one of them, and they declared him bankrupt accordingly. AND WHEREAS the faid commissioners, parties to these presents, in further execution of the faid commission, and of the statutes therein mentioned, and by virtue of the same, by indenture bearing date the (a) day of made between the faid Thomas Nugent, John Fenshawe, and Champion Branfil, of the one part, and William Chessbyre of of the other part, for the confideration there-

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<sup>(</sup>a) Date of the provisional assignment, which see in fol. 332.

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in mentioned, did as much as in them lay, and they lawfully might, order, bargain, fell, difpofe, affign, and fet over, unto the faid William Chessbyre, his executors, administrators, and affigns, all and fingular the goods, wares and chattels, debts, fum and fums of money, and all the personal estate whatfoever of the faid Francis Gibbons, of which he was possessed or intitled unto, or of which any other perion or persons was or were possessed, IN TRUST for him at the time he became banbrupt, or at any time fince. To HOLD, ask, demand, sue for, recover, levy, and receive, all and fingular the premiffes thereby affigned, or mentioned, or intended fo to be. unto the faid William Chessbyre, his executors, administrators, and affigns, IN TRUST for the immediate preservation thereof, and to and for the use, benefit and advantage of all the creditors of the faid Francis Gibbons, who had then fought, or should then after in due time come in and feek relief, under the faid commission, according to the leveral statutes therein mentioned, or some or one of them, and to or for no other use, trust, intent or purpose whatfoever, as in and by the faid recited indenture, relation being thereunto had, will and may more fully and at large appear. AND WHEREAS the faid William Chessbyre did, in and by the faid recited indenture of affignment, covenant and agree, to and with the faid commissioners, parties thereto, their executors and administrators, and to and with every. of them, that he the faid William Chesfbyre, his executors or administrators, or tome or one of them, should and would, as soon as an affiguee or affiguees of the faid bankrupt's estate and effects should be duly chosen and appointed, join with the major part of the commissioners named in the taid commissions. in affigning all and fingular the faid goods, chattels, debts, fum and fums of money, wares and mer-5 5 - chandizes,

chandizes, and all other the premisses in the faid recited indenture affigned to him, unto fuch person or persons, as should be duly chosen and appointed to be the affignee or affignees of the faid bankrupts estate and effects, and that he the said William Chef. there, would deliver up all the estate and effects of the faid bankrupt, as should or might have come to his hands or poffession, or to the hands or possession of any other person or persons, IN TRUST for him, or for his use, unto such person or persons, as should be duly chosen affignee or affignees of the faid bankrupt's estate or effects, or otherwise, as the said commissioners should direct or appoint, as in and by the faid recited indenture may more fully and at large appear. AND WHEREAS at a meeting of the major part of the commissioners, in and by the said commission named and authorized, at the Guildhall, of the city of London, the day of pursuant to notice in the London Gazette, for that purpole given, the major part in value of the creditors of the faid Francis Gibbons then present, and who had proved their debts under the faid commission, and whose debts respectively amounted to ten pounds or upwards, did nominate, elect and chuse, the said John Partridge and Charles Dennis, to be the affignees of the estate and effects of the faid Francis Gibbons, and defired an affigument to be made thereof to them accordingly by the faid William Chessbyre, and the faid commissioners. AND WHEREAS by (a) indenture tripartite, bearing date the day of made between the faid William Chaspyre of the first part, the faid commissioners, parties hereto.

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the first part, the said commissioners, parties hereto, of the second part, the said John Partridge and Charles Dennis of the third part, the said William Chessbyre for the consideration therein mentioned, by

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<sup>(</sup>a) Viz. the affigument after a temporary, which see in fol. 387.

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the confent and direction of the faid commissioners, parties hereto, teftified by their being made parties to, and fealing and delivering thereof. Dip order, bargain, felly dispose, assign, and set over, unto the faid John Partridge and Charles Dennis, their executors, and administrators, all and fingular the goods, wares, and chattels, debts, fum and fums of money, and all the personal estate whatsoever of the faid Francis Gibbons, of which he was possessed of or intitled unto, or which any other perfor or perfors was or were possessed of, IN TRUST for him at the time he became bankrupt, or at any time fince; and all the right title, interest, property, claim, and demand what soever of him the faid William Chefflyre of, in, or to the same, or any part thereof, as affignee of the effate and effects of the faid Francis Gibbons, and the faid commissioners, parties thereto, being the major part of the faid commissioners in and by the faid commission named and authorised in confideration of 5s. to them, or one of them, in hand also paid by the faid John Partridge and Charles Dennis, did as much as in them lay, and they lawfully might, ratify and confirm unto the faid fohn Partridge and Charles Dennis all and fingular the faid goods, wares, and chattels, debts, fum and fums of money, and other things, and all the effate whatfoever and wherefoever, of and belonging to the faid Francis Gibbons therein before ordered, bargained, fold, disposed, assigned and set over by the said William Chesshyre, party thereto; To HOLD to the laid John Partridge and Charles Dennis, their executors, administrators and affigns, UPON TRUST NEVER-THELESS, to and for the ule, benefit, and advantage, of all the creditors of the faid Francis Gibbons, who had then already fought, or hould thereafter in due time come in and feek relief by virtue of the faid commission, according to the limitations and S 6 directions-

directions of the several statutes in that behalf made and provided, and to and for no other use, intent . or purpose whatsoever, as in and by the said last recited indenture of affignment, relation being thereunto had, may more fully and at large ap. pear. AND WHEREAS by an order of the present lord high chancellor of Great Britain, made on day of instant, founded upon the petition of and and creditors of the faid Francis Gibbons, preferred to the faid lord chancellor, his lordship upon hearing the said petition read, and what was alledged by the counsel for the faid petitioners, and by confent of the counsel for the assignees, the said John Partridge and Charles Dennis, did, (amongst other things) order that the faid John Partridge and Charles Dennis, at their own defire, should be discharged from being assignees of the said bankrupt's estate and effects, and that the major part of the faid commissioners named in the faid commission, should cause due notice forthwith to be given and published in the London Gazette, appointing a time and place for the creditors of the faid Francis Gibbons to meet, in order to proceed to the choice of a new assignee or asfignees, in the room of the faid John Partridge and Charles Dennis, and that the creditors of the faid bankrupt, who should be present at such meeting, should proceed to such new choice accordingly, and that after such choice, the major part of the faid commissioners should make and execute a new aslignment of the estate and effects of the faid bankrupt, remaining unreceived and not disposed of, to fuch person or persons, who at such meeting should be chosen such new assignee or assignees, and that the faid John Partridge and Charles Dennis should join in the faid affigument, to the faid new affignee or affignees, as by the faid in part recited order, relation

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lation being thereunto also had, may more fully and at large appear. AND WHEREAS in pursuance of the faid in part recited order, notice in the London Gazette of the day of this inftant Del was duly given, purporting that the commissioners intended to meet on the day of this inflant at four of the clock in the afternoon, at Guildhall, Landon, in order to proceed to the choice of new affignees, in the room of the faid John Partridge and Charles Dennis: AND WHEREAS the commissioners, parties to these presents, in obedience to, and in pursuance of the faid order, and likewise of the said notice so given in the London Gazette as aforesaid, met at the Guildhall of the City of Londay of in order to chuse an affignee or affignees of the faid bankrupt's estate and effects, and the major part of the creditors of the faid Francis Gibbons present, and who had proved their debts under the faid commission, and whose debts respectively amounted to ten pounds or upwards, did nominate, elect, and chuse the said Andrew Finch to be the fole affignee of the effate and effects of the faid Francis Gibbons, remaining unreceived and not disposed of, in the room of the said John Partridge and Charles Dennis. Now THIS INDENTURE WITNESSETH, that the faid John Partridge and Charles Dennis, in obedience to, and in pursuance of the faid recited order, and in confideration of the fum of 10s. of lawful money of Great Britain, to them in hand paid by the faid Andrew Finch, at or before the fealing and delivery of thefe presents, the receipt whereof is hereby acknowledged, and also in consideration of the covenants herein after, on the part and behalf of the faid Andrew Finch. his executors, or administrators, to be performed by the confent and direction of the faid commissioners, parties to these presents, testified by their being made parties

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parties to and fealing and delivering hereof, HAVE ordered, bargained, fold, disposed, affigned, and set over, and by these presents, Do order, bargain, fell, dispose, assign, and fet over, unto the faid Andrew Finch, his executors and administrators, all and fingular the goods, wares, chattels, debts, fum and fums of money, and all the personal estate whatsoever, of the faid Francis Gibbons, of which he was possessed or entitled to, or which any other person or persons, was or were possessed of, in trust for him at the time he became bankrupt, or at any time fince, and all the right, title, interest, property, claim, and demand whatfoever, of them the faid John Partridge and Charles Dennis, of, in, or to the same, or any part thereof, as affignees of the estate and effects of the faid Francis Gibbons, and the faid commissioners, parties to these presents, being the major part of the faid commissioners in and by the faid commission named and authorized, in confideration of 5s. to them, or one of them, in hand also paid by the said Andrew Finch, HAVE ratified and confirmed, and by these presents Do, as much as in them lie, and they lawfully may, ratify and confirm, unto the faid Andrew Finch all and fingular the faid goods, wares and chattels, debts, fum and fums of money, and other things, and all the estate whatsoever and wherefoever, of and belonging to the faid Francis Gibbons, herein before ordered, bargained, fold, difposed, assigned, and set over by the said John Partridge and Charles Dennis, parties hereto; TO HAVE AND TO HOLD, alk, demand, fue for, ecover, levy, and receive the faid goods, wares, chatrels, debts, fum and fums of money, and other things, and all other the effects whatfoever, of, or belonging to the faid Francis Gibbons, hereby ordered, bargained, fold, disposed, assigned and set over, or hereby mentioned or intended so to be, unto the said Andrew Finch, his et

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his executors administrators, and affigns, upon TRUST NEVERTHELESS, to and for the ufe, benefit, and advantage of all the creditors of the faid Francis Gibbons, who have already fought, shall hereafter in due time come and seek relief by virtue of the faid commission, according to the limitations and directions of the feveral ftatutes in that behalf made and provided, and to and for no other use, intent, or purpose whatfoever : AND the faid Andrew Finch, for himself, his heirs, executors, and administrators, doth hereby covenant, promise, and agree, to and with the faid commissioners, parties to these presents, and to and with every of them by these presents, that he the faid Andrew Finch, his executors, administrators, or assigns, shall and will with all convenient speed, by all lawful and equitable ways and means, use his utmost endeavours to recover and get in the several goods, wares, and chattels, debts, fum and fums of money, and all other the estate and eff ets of the said Francis Gibbons, and after possession had and obtained of the said goods, wares, and chattels, debts, fum and fums of money, estate and effects whatsoever, or any part thereof, shall and will fell and dispose of the same, to and for the most and best value he can get for the same: AND FURTHER, that he the said Andrew Finch, his executors, administrators, and assigns, shall and will from time to time, and at all times hereafter, upon reasonable request and notice to him given for that purpose, render and give unto the faid commissioners, parties to these prefents, or the major part of the faid commissioners in and by the faid commission named and authorized, or to the major part of the faid commiffioners to be named in and by any renewed commillion, which may be awarded against the faid

Francis Gibbons, at fuch time and place as they shall appoint, a true, just and perfect account in writing under the hand of the faid Andrew Finch, his executors, and administrators, of what and how much money or other fatisfaction, he the faid An. drew Finch, his executors or administrators, shall have had, recovered, and received, by virtue or means of this prefent deed of assignment, or otherwife, out of the estate and effects of the said Francis Gibbons, and fuch money or other fatisfaction. as upon such account shall appear to be had, railed, and received by the faid Andrew Finch, his executors or administrators, he the faid Andrew Finch. his executors or administrators, shall and will truly pay, or cause to be paid unto them the said com. missioners, parties to these presents, or the major part of the faid commissioners in and by the faid commission named, or to the faid commissioners to be named in any fuch renewed commission, or the major part of them, or to fuch person or persons as they shall appoint, to the end, the same or other fatisfaction may be, by them the faid commissioners, in and by the faid commission named and authorized, or the major part of them, ordered, difposed, distributed and divided, unto and amongst all and every the creditors of the laid Francis Gibbons, who have already fought, or shall hereafter in due time come in and feek relief by virtue of the faid commission, according to the limitations and directions of the feveral statutes therein mentioned, proportionably according to the feveral debts owing to them respectively from the said Francis Gibbons. AND LASTLY, the faid Andrew Finch doth hereby for himselt, his heirs, executors, and administrators, covenant, promise, and agree, to and with the faid commissioners, parties to hele presents, their heirs, executors, and administrators,

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tors, that he the faid Andrew Finch, his executors and administrators, shall and will from time to time, and at all times hereafter, well and fufficiently fave, defend, keep harmless and indemnify, the faid commissioners, in and by the faid commisfion named and authorized, and also the said John Partridge and Charles Dennis, their executors, and administrators, and every of them, their and every of their bodies, lands, tenements, goods and chattels, of, and concerning, or concerning all and all manner of action and actions, fuits, arrefts, troubles, coffs, damages, and expences whatfoever, which they or any of them thall fuffain or be put unto, for or by reason of this present deed of asfignment, or any other act or acts, thing or things, lawfully done or executed by virtue of the faid commission, or the said recited affignment, or their or any of their lawful intermeddling in any of the estate of the said Francis Gibbons. IN WIT-NESS, &c."

The folicitor who petitions for the removal of affignees, and the appointment of others, must, previous to the execution of the above special assignment, insert an advertisement in the London Gazette of such removal, and also of the intended sitting to appoint others.

## Advertisement on the removal of offignees.

"The commissioners in a commission of bankrupt awarded and issued against Francis Gibbens of, &c. intend to meet at Guildball, on (a) the day of when and where

<sup>(</sup>a) There must be a week's notice at least of this sitting. See fol 339.

the creditors of the said bankrupt, who have already proved their debts under the said commission, are to attend in order to chuse one or more assignee or assignees of the said bankrupt's estate and effects, in the room of John Partridge and Charles Dennis, the late assignees, who have been discharged from being assignees by an order of the right honourable the lord high chancellor of Great Britain (a)."

The acting commissioners under the commission are enjoined to cause, immediately after the removal of the sormer assignees and the choice of others, public notice to be given in two London Gazettes, that the sormer assignees are removed, and others appointed in their stead.

## Advertisement on the choice of new assignees.

- "The acting commissioners in a commission of bankrupt awarded and issued against Francis Gib-
- bons of, &c. do hereby give notice (b), that John Partridge and Charles Dennis, late affignees of the
- " estate and estects of the said bankrupt, have been
- " discharged from being affiguees, by an order of
- the right honourable the lord high chancellor of
- " Great Britain, and that Andrew Finch is ap-
- of pointed affignee in their flead, and that the faid
- " bankrupt's debtors are not to pay their debts to

lumcient proof upon oath, before them had and

" the affignees removed." beyonn examination "the affignees removed."

taken, that the faid Francis Cies ortdlof see (a)

(b) By virtue of the flat, 5 Geo. 2. c. 30. f. 3x. Though this act of parliament expressly directs that such notice shall be inserted in the two London Gazettes, immediately following the removal of affignees, and the appointment of others, yet we cannot recollect of having ever met with any such notice, in the Gazette.

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## Bargain (a) and fale.

" THIS INDENTURE made the in the ninth year of the reign of our .. " fovereign lord George the Third, by the grace of " God of Great Britain, France, and Ireland, king, " defender of the faith, &c. and in the year of our " Lord 17 between Thomas Nugent, esquire, " Richard Wood and Thomas Life, gentlemen, of the " one part, and John Partridge of, &c. and Charles " Dennis of, &c. of the other part: WHEREAS his " majesty's commission under the great seal of " Great Britain, grounded upon the several statutes " made and now in force concerning bankrupts, " bearing date at Westminster the " day of October, in the year of our Lord 1768, " hath been awarded and iffued against the faid " Francis Gibbons, and directed to Thomas Nugent, " John Fenshawe, Champion Branfil, esquires, " Richard Wood, and Thomas Life, gentlemen, " thereby giving full power and authority, to the " faid commissioners, four or three of them, to " execute the fame, as in and by the faid com-" miffion, relation being thereunto had, more fully " and at large it doth and may appear. AND "WHEREAS upon the execution of the faid com-" mission, it appeared to the major part of the com-" missioners in the faid commission authorized, " upon due examination of witnesses, and other " fufficient proof upon oath, before them had and " taken, that the faid Francis Gibbons did, from " the month of January 1760, carry on the trade

<sup>(</sup>a) The original, to be executed by the commissioners, must be engroffed on five-shilling stamped skins of parchament; and the counterpart to be executed by the assignees, on 2s. 6d. stamped skins.

"and business of a merchant, by buying and fell-" ing, and by exporting and importing divers " kind of goods, and did by fuch trade and bufi-" ness seek and endeavour to get his living, as other merchants usually do, and that in the course of his said trading and dealing he became " indebted unto Charles Jones of, &c. in the fum of 100 l. and upwards, for goods fold and delivered. AND WHEREAS the faid Francis Gibbons " did, in the judgment of the major part of the " faid commissioners, become bankrupt to all in-tents and purposes, within the compass, true " intent and meaning of the feveral statutes made and now in force concerning bankrupts, or within some or one of them before the date and " fuing forth of the faid commission, they did ad-" judge and declare him bankrupt accordingly, "AND WHEREAS the major part of the faid com-" missioners, parties to these presents, in further execution of the faid commission, and by due examination of witnesses upon oath found, or it " otherwise appeared unto them, that the said " Francis Gibbons at the time or times he became bankrupt as aforesaid, was seized, interested in, or intitled unto diverse messuages, lands, tene-" ments, and hereditaments, fituate, lying, and " being at in the county of and elsewhere, in the kingdom of Great Britain. Now THIS INDENTURE WIT-" NESSETH, that the faid commissioners, parties to " these presents, in further execution of the said commission, and by force and virtue thereof, and of the statutes therein mentioned, and for and in confideration of the fum of five shillings, of lawful money of Great Britain, to them the " faid commissioners, in hand well and truly paid by them the said John Partridge and Charles Den-

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nis, at or before the fealing and delivery of thefe orefents, the receipt whereof is hereby acknow-" ledged, and also in consideration of the covenants and agreements herein after contained, on the " parts and behalfs of them the faid John Partridge and Charles Dennis, their heirs, executors, ad-" ministrators and affigns, to be kept, done and per-" formed, HAVE ordered, granted, bargained, and " fold, and by these presents (as much as in them " the faid commissioners, parties to these presents " lie, and they lawfully may) do order, grant, bar-" gain and fell unto them the faid John Partridge " and Charles Dennis, their heirs, and affigns, all the " faid bankrupt's meffuages, lands, tenements, and " hereditaments, AND ALSO all the effate, right, " title, interest, use, trust, property, possession, be-" nefit, equity of redemption, claim and demand " what soever, which he the said Francis Gibbons at " the time of his becoming bankrupt as aforefaid " had of, in, or to all and fingular the faid mef-" fuages, lands, tenements, hereditaments, and " all and fingular other the premisses herein be-" fore mentioned, and hereby ordered, granted, " bargained, and fold, or mentioned, or intended " fo to be, with their, and every of their appurte-" nances. AND ALSO all other meffuages, lands, " tenements, and hereditaments whatfoever and " wherefoever, which he the faid Francis Gibbons " hath purchased or obtained for money, or other " recompence (a) jointly with his wife, children or child, to the only use of him the said Francis "Gibbons; AND ALSO all such use, estate, interest, " right and title whatfoever, which he the faid "Francis Gibbans had of, in, or to any messuages, " lands, tenements, or hereditaments whatfoever, at chemeine land fohn artridge and

<sup>(</sup>a) See fol. 184.

the time he became bankrupt as aforesaid, which he could depart withal; AND all and fingular "other the premisses herein before bargained and " fold, or mentioned or intended fo to be, TO HAVE " AND TO HOLD ALL and fingular the faid mef-" fuages, lands, tenements, and hereditaments, with their and every of their appurtenances, unto them the faid John Partridge and Charles Dennis, their heirs and affigns, to and for the only proper " benefit and advantage of them the faid John Par-" tridge and Charles Dennis, their heirs and affigns " for ever, or according to the faid Francis Gibbons, his right and interest therein, subject to such so mortgage or mortgages or other charges and incumbrances (if any fuch there be) as the fane " are legally charged with and liable to. In "TRUST NEVERTHELESS for the benefit and ad-" vantage of them the faid John Partridge and " Charles Dennis, and all and every other the creditors of the faid Francis Gibbons, who already have come in and fought relief, or shall hereafter in " due time come in and feek relief by virtue of the " faid commission, or any renewed commission, a-" gainst the said Francis Gibbons, and duly prove " and ascertain their several and respective debts un-" der the fame, according to the directions and li-" mitations of the faid statutes, and as to the over-" plus, if any shall be, after payment and satisfacc tion of all such debt or debts, as shall or may be " proved under the faid commission, or any renewed " commission, against the said Francis Gibbons, and " the charges of fuing forth and profecuting the fame, IN TRUST for the faid Francis Gibbons, his 66 heirs or affigns, according to the statutes, and the true intent and meaning thereof. AND the faid " John Partridge and Charles Dennis, each of them " for himself separate and apart, and for his own

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" heirs,

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" heirs, executors, and administrators, acts, and " deeds only, and not either of them for the other of them, his heirs, executors or administrators, acts or deeds, do hereby feverally and respectively " (a) covenant, promise, and agree, to and with the " faid commissioners, parties hereto, by these prece fents in manner following, that is to fay, that each of them the said Jahn Partridge and Charles Den-" nis, and their respective heirs and affigns, shall " and will, with all convenient speed, use their best " endeavours, by fuits at law or otherwife, to re-" cover and get possession of the said messuages, " lands, tenements, and hereditaments, and shall. " and will after recovery and polleffion had of the " fame, or any part thereof, make fale and disposi-"tion thereof, with the like convenient speed, to " and for the most money, and best price, he or " they can or may bona fide obtain for the same. " AND FURTHER that they the said John Par-" tridge and Charles Dennis, their heirs, executors, " and administrators, shall and will from time to " time, and at all times hereafter, upon reasonable " request or notice to them given for that purpole, " under the hands of the commissioners by the said " commission, or any renewed commission autho-" rized as aforesaid, or the major part of them, ren-" der and give unto the faid commissioners, by the " faid commission, or any renewed commission, au-" thorized as aforefaid, or the major part of them, a " just and true account of all and every fuch fum " and fums of money, or other fatisfaction, which " they the said John Partridge and Charles Dennis, " their heirs, executors or administrators respec-" tively, shall or may have received, obtained, or " raifed by virtue of these presents, or by means of

<sup>(</sup>a) Or thus: for themselves severally, and not jointly, or one for the other, or for the heirs, executors, or administrators, or for the act or deed of the other, doth covenant, &c.

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this present deed of bargain and sale, out of the faid Francis Gibbons's estate hereby bargained and " fold, and all fuch monies of other fatisfaction, as shall appear to be so by them respectively received, had, obtained, or raifed by them, as aforefaid, they the faid John Partridge and Charles Co Dennis shall and will (after all just allowances se thereout deducted) upon the like reasonable re-44 quest, well and truly pay, fatisfy and render, or cause to be paid, satisfied, and rendered, to them " the faid commissioners authorized, or the major part of them, or as they or the major part of them shall direct or appoint under their hands. 46 To THE END the same monies or other satis-" faction, may be by them the faid commissioners, " in and by the faid commission, or any renewed " commission authorized, or the major part of them, ordered, disposed, distributed, and divided, unto " and amongst all and every the creditors of the s faid Francis Gibbons, who have already come in " and fought relief, or shall hereafter in due time come in and feek relief by virtue of the faid com-" mission, according to the limitations of the said " statutes therein mentioned, as aforesaid, to the end the same monies and other satisfaction may " be answered and paid to the creditors seeking re-" lief as aforefaid, proportionably according to their feveral debts due and owing to them re-" spectively, from the said Francis Gibbons, accord-" ing to the order of dividend, to be made by the " faid commissioners of the same, and until such " monies shall be so disposed of, and divided, shall " and will pay and deposit the same into the hands of Sir Richard Glyn, Bart. and Co. bankers, in " Lombard-street, London, as often as the same shall " mount to the fum of 1001. or upwards. " they the faid John Partridge and Charles Dennil 66 for 1

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of for themselves severally and respectively, and for " their feveral and respective heirs, executors, and and administrators, do further covenant, pro-" mife, and agree, to and with the commissioners, " parties hereto, and to and with every of them, " and their executors and administrators, that they " the faid John Partridge and Charles Dennis, their " and each of their executors, administrators, and " affigns, shall and will, from time to time, and " at all times hereafter, well and fufficiently fave. " defend, and keep harmless and indemnified, as " well the faid commissioners, parties to these pre-" fents, in and by the faid commission named and " authorized, or by any renewed commission to " be named or authorized, and their heirs, exe-" ecutors, and administrators, and every of them, " as their and every of their bodies, goods, chat-" tels, lands, and tenements, and every of them, their and every of their messengers, agents, and fervants, who have been by them, or any of them employed, in or about the execution of the faid commission, of, from, and against all and all manner of actions, fuits, troubles, charges, damages, and expences whatever, that shall or may at any time or times hereafter arife, happen, or come unto them the faid commissioners, or any or either of them, or any of their mellengers, agents, fervants, heirs, executors, or administrators, for or by reason or means of this present deed of affignment, or any other act, matter, or thing, by them, or either or any of them lawfully acted or done by virtue of the faid recited commission, or by their or any of their lawful intermeddling in the estate or effects of the faid Francis Gibbons. IN WITNESS, &c.

Т

Memo-

### Memorandum of executing bargain and fale.

the commission of bankrupt, awarded and is by a commission of bankrupt, awarded and is such against Francis Gibbons of, &c. whose names are hereunto subscribed, met the day and year, and at the place above-mentioned, and examined and executed a bargain and sale of the said bankrupt's real estate to John Partridge of, &c. and Charles Dennis of, &c. the assignment of the said bank-

by the creditors under the faid commission."

equire, therein mentioned, who prayed

Thomas Nugent.

Richard Wood.

And Thomas Life.

If the bankrupt's real estate is conveyed to affignees, and one of them dies, this is a jointenancy, and goes to the furvivor; and he alone may sell such estate to a purchaser; but if both die before any conveyance is made, then the heir at law of the survivor must convey to such new assignees, as the court shall appoint, or join with such new assignees in the conveyance to a purchaser.

by the commissioners, must be (a) involled in some court of record at Westminster, within (b) lix months after the date of the deed.

The courts of record in which it is generally inrolled are the Chancery, King's Bench, Common Pleas, and Exchequer.

(a) The affiguees cannot maintain an action concerning the bank-rupt's real efface, till the bargain and tale is involled. See fol. 190. Note (g).

(6) By ftat. 27 H. S. c. 16. f. 1.

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## In the court of chancery.

If it is to be inrolled in chancery, one of the commissioners who executed the bargain and sale must acknowledge it before a master, either at the public office in Symond's Inn, Chancery-lane, or at the master's house; but if a commissioner cannot attend, then one of the witnesses must make an afsidavit of the due execution of the deed, which must be annexed. In this court a siat is never granted.

When the same is acknowledged, the acknowledgment thereof must be wrote at the bottom, or

on the margin of the deed, in this form:

"This indenture was acknowledged by Thomas "Nugent, esquire, therein mentioned, who prayed

" that the same might be inrolled, on the

" day of June 1769, before

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fol. 190.

" Richard Edwards."

This acknowledgment must be figned by the master, and then the deed must be engrossed on rolls of the court, when acknowledged. You take the deed to the clerk of the inrolments, whose office is under the chancery office, in Chancery-lane; he provides rolls and inrols the deed, without giving you any trouble, except taking the deed to and from the office when inrolled, and the certificate endorsed thereon.

#### Fees of involment.

or or and the		55(14) 5 a (1	Officer's charge.			Solicitor's		
Acknowledging			0	2	6	0	2	6
wearing affidavit			0	1	6	0	1	6
	T 2					In	rolli	ing

Inrolling for each roll or?				
press, containing 90 lines, and each line 14 words.	0 10	0	0 10	0
Indorfing and certifying	0 5	4	0 5	4

Besides a see of half a guinea to the commissioner who acknowledged the deed, and the charge of drawing and engrossing the assiduvit, in case no commissioner can attend; but the solicitor can charge nothing more than his own attendances, the full sees of involment being paid at the office.

#### In the king's bench.

If you intend to inroll the deed in this court, one of the commissioners must acknowledge it either in court, or before a judge at his chambers; the deed must be left with the judge, who with his own hand delivers in open court to the fecondary [i. e. the mafter] and defires him to inroll it; if in term time, the deed may be got immediately, but if in vacation, it must remain with the judge till the following term; when you get the deed, call for as many rolls as you want, at the clerk of the dockets, in the King's Bench office, or from Billing fley, stationer in Chancery-lane; you pay four pence for each roll, which is allowed you again on carrying in the rolls, and when you have engroffed the deed on the roll, prefixing such one of the following preambles as may fuit the acknowledgment, you docket the rolls with the clerk of the dockets, who will indorfe the number roll upon the deed; but if the deed happens to be of a prior term, then call at Mr. Wallis's, at Nisi Prius office, No. 12, Holborn Court, Grays Inn, for the number roll. the same indentages, and his deed, might be

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You must remember to take with you to the clerk of the dockets, the deed, and the rolls, and also a docket upon a flip of paper to the following effect, viz.

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You

a Mich. Term, in the ninth year of the reign of king George the Third.

" Entries of James Browne, gentleman, one of the attornies, &c.

" An indenture dated, &c. between Thomas Nu-" gent, esquire, Richard Wood and Thomas Life, " gentlemen, of the one part, and John Par-" tridge of, &c. and Charles Dennis of, &c. of the " other part." Roll. 1001.

This officer also indorses a certificate on the deed, which done, he returns it to you.

deed much be left with the

filem and 15 at 17 as

for each rolls which is

## Preambles.

The preamble of the invollment of a deed, when the Same is acknowledged in court.

" As yet of Easter term (as the term shall be). " Witness William, lord Mansfield.

Lyon again

Be it remembered, that on-" England, to wit. Wednesday next after to days of Eafter in this fame term, " before our lord the king at Westminster, came Thomas Nugent, esquire, in his proper person, " and brought here into the court of our faid lord the king, then there, a certain indenture, which "he acknowledged to be his deed, and prayed that the same indenture, as his deed, might beenrolled of record, before our faid lord the T. 3

"king, at Westminster; and it is involled in the following words: To wit, this indenture, &c." (the deed verbatim.)

The preamble where the indenture is acknowledged before the chief justice at his chambers.

England, to wit, 

Be it remembered, That on,

&c. in this same term, before
our lord the king at West-

minster, William lord Mansfield, chief justice of our said lord the king, affigned to hold pleas,

before the king himself, records, that on the (a) day of last past, Thomas

" Nugent, esquire, in his own proper person, came before the said chief justice at his chambers, si-

tuate in Serjeant's Inn, in Chancery-lane, and brought before the said chief justice, then there,

a cerrain indenture, which he acknowledged to

" be his deed, and prayed that the faid indenture, as his deed, might be enrolled of record, in the

court of our faid lord the king, before the king himself, at Westminster; and which said inden-

" ture the aforesaid chief justice, by his own pro-

per hands, now delivers here into court, to be

inrolled in form aforesaid; and it is inrolled in the following words: to wit; This indenture, &c. and go on verbatim with the deed, copying

every word, with the names of the parties figning, and making this mark (L. S.) for the feals, then the attestations, receipts, and all other indorsements; and lastly examine the incomment with

the deed.

The certificate to be indorfed on the deed in rolled.

of (a) The date of the acknowledgment of the deed.

. Thomas

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# "Thomas Nugent, esquire, and others, to John Partridge and Charles Dennis.

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Thomas

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" king, at W. Amunder ; and it is involled in tall

"Inrolled in the court of our lord the king, be"fore the king himself at Westminster, of Mich.
"Term (as the Term is) in the ninth year of the
"reign of our sovereign lord George the third,
"king of Great Britain, &c." Roll. 1001.

## seed blod of bees of Inrollment, bod bist up

ell, recoids, that on the (a) laft paft, Thinks		ffice	37-13	Attorney's			
Acknowledging in court Before a judge at his chambers	0	3	0	0	3	0	
Inrolling each theet	0	0	3	0	0	8	
Docketting and carrying in }	0	3	6	. 0	3	6	
yed that the faid indenture,	siq	bit	s ,b	obb ei		1 12	

Befides the commissioner's fee for acknowledging; the charge of drawing and engrossing the affidavit, if necessary, and attendances.

## In the Common Pleas.

If the deed is to be inrolled in C. B. you carry the deed to a judge, either at his chambers or at his house; or, if in term time, it may be done at Wishminster hall; one of the commissioners must attend and acknowledge it, the acknowledgment, (the officer's warrant for inrolling the deed) is wrote on the margin of the deed, generally by the judge's clerk. The form of the acknowledgment is;

ad The date of the sexes week cet of the deed.

" The execution of this deed was acknowledged (in court) by T. N. (the commissioner acknow. Ledging) party thereto, this feventh day of May

1769, before J. E. W." (the name of the judge.)

The deed being properly acknowledged, get the rolls from the clerk of the warrants of attorney, whose office is at No. 6. Clifford's Inn, for which you pay nothing, and having engrossed them yourfelf, and left a space for prefixing the preamble, which is done by you, by the clerk of the warrant's dictating; for which purpose you carry him the deed and rolls, who will indorse, docket, and inroll the deed immediately, for it is not necessary in this court, as in the King's Bench, for the attorney to indorse the deed, or carry in any docket, the clerk of the warrant being obliged to do all himself, and also, if desired, to ingross the deed upon the rolls, which is begun in this form.

"T. N. (the commissioner acknowledging) came into his majesty's court of Common Pleas at West-minster; (if the deed was acknowledged in court) the day of June, in this same term, before Sir William De Grey knight, (the name

of the judge before whom the acknowledgment happens to be taken) lord chief justice of the said

court, (if the deed be not acknowledged in court) and acknowledged this writing following to be his

deed, and required the same to be inrolled, and it is inrolled in these words; to wit, This indenture,

word, the names of the parties figning, making this mark (L. S.) for a feal, and the attestation, receipt, and all indorsements, and last of all examine the involment by the deed, carefully reading the deed, and not the involment.

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### Fees of Involument.

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Acknowledging in court	0 1 0	0 1 0		
Before a judge at chambers	0 5 0	0 5 0		
Inrolling each sheet	0 0 3	0 0 8		
Docketing and certificate	0.10	0 3 4		

Besides the commissioner's see, the affidavit, and common attendances.

### In the Exchequer.

If the invollment is to be in the Exchequer, you carry your deed to your clerk in court, who finds rolls and involls it himself.

In case the bankrupt happens to be in prison, on mesne process only, (for if he is in execution, the commissioners must attend him there) it may be proper to get the commissioners to sign their warrant directed to the keeper of the prison, to bring the bankrupt before them at the next fitting, in order to take his surrender and last examination.

#### The warrant.

"WHEREAS a commission of bankrupt hath been awarded and issued against Francis Gibbons, of, &c. directed to us whose names are hereunto subscribed, and to the other commissioners in the faid commission named, and he being declared bankrupt, and the day of instant, being one of the days appointed in the

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London Gazette for the faid Francis Gibbons to fur-" render himself to the said commissioners, and we 66 being informed that the faid Francis Gibbons is in " your custody upon mesne process, and not in execution : these are therefore to defire you to bring the body of the faid Francis Gibbons before us at Guildhall, in the city of London, on next, being the day of 46 instant, at four of the clock in the afternoon, in order to be examined by us, pur-" fuant to the act or acts of parliament made and " now in force concerning bankrupts; and this " shall be your sufficient warrant. Given under " our hands this day of June, 1769.

" To Benjamin Thomas " efquire, marshal of the King's Bench er prison, or to his "deputy there," a noting stand

Thomas Nugent, Richard Wood. Thomas Life.

If the bankrupt happens to be in the Fleet prison, then the commissioners warrant must be directed thus; "To John Eyles, efquire, warden of his " majefty's prison of the Fleet, or to his deputy " there." If he is in Newgate, then thus; "To the heriff of Middlefex, and to Richard Akerman, keeper of his majesty's prison of Newgate, or to his deputy there." If in either of the compters, thus , " To the theriffs of London, and to " REW north keeper of the Poultry, or of Wood firest compter, or to his deputy there." If in a country goal, thus; "To elquire, fheriff of the county of and to keeper of the faid county goal, or to " his deputy there."

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066 01110 As the bankrupt may not be able to furrender, or be prepared to finish his examination by the next fitting, we will direct him how to enlarge the time for these purposes.

The application must be by petition to the Great Seal, six (a) days at least, before the last sitting appointed in the Gazette; this petition may be either in the name of the bankrupt, or of his assignees; the allegations of which petitions are various, according to the circumstances of the case. We will draw up forms of both sorts, and leave the solicitor to use such of them as in his judgment and discretion best suit his particular purpose.

" In the matter of "Francis Gibbons

Thomas Life.

" bankrupt."

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- "To the right honourable 
  the lord high chancellor of Great Britain."
- "The humble petition of Francis Gibbens, bankrupt,

then the commissioners warraghtweether direct

- That a commission of bankrupt under the great seal of Great Britain, bearing date at West-minster the day of May last, upon the petition of Charles Jones, of High Holbern, in the county of Middlesex, mercer, was awarded and issued against your petitioner, by the name and description of Francis Gibbons, of the city of London, merchant, which commission was directed to Thomas Nugent, John Fenspace, Champion Bransil, esquires, Richard Wood, and Thomas Life, gentlemen, as commissioners to execute
  - (a) By flat. 5 Geo, 2. c. 30. f. 3.

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"That your petitioner hath been duly declared bankrupt by the major part of the faid commif-" missioners, in and by the said commission named " and authorized, and by fummonce under their 66 hands, and also by notice in the London Gazette, of Tuefday the day of May 1768, was required to surrender himself to the said commis-" fioners, or the major part of them, at Guild-" hall, London, to be examined by them on the 10th and 20th days of the faid month of June " respectively, at four of the clock in the after-" noon, on each of the faid days, touching the of disclosure and discovery of his estate and effects, " and on the 5th day of July last, your petitioner " was by fuch summonce and notice, required to " finish his examination under the said commis-" fion.

That your petitioner did surrender himself to the said commissioners on the said 10th and 20th days of June last, and submitted to be examined touching the disclosure and discovery of his estate and essects, and to conform himself to the several acts of parliament made, and now in force, concerning bankrupts.

"That your petitioner is preparing and fettling his affairs in order to make a full and true difcolore and discovery of all his estate and essects, but your petitioner finds his accompts so very long, intricate, and perplexed, that he cannot possibly finish the same by the time limited by the said commissioners summonce and notice respectively, for that purpose."

#### Or thus,

"THAT your petitioner is ready to furrender himself to the major part of the commissioners

in the faid commission named and authorized, on the fifth day of July instant, at Guildhall, London, and then and there to make a full disclosure and discovery of all his estate and essects, but one of the said commissioners being in a bad state of health, so that he cannot attend to take your petitioner's last examination, and two others of the said commissioners being in the country, so far remote from London, that they cannot be had in due time to take such examination, it becomes necessary for your petitioner to have his time en-

June 1768.

"Be it as prayed,
"hereof giving.
"(a) notice to the

" commissioners

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in

" forthwith. " Camden, C."

"Your petitioner, therefore, " most humbly prays your lord-" fhip would be pleased to or-" der, that the time for your " petitioner's furrendering him-" felf to the commissioners in " the faid commission named, " or the major part of them, " and for fully disclosing and " discovering his estate and ef-" fects, and finishing his last " examination under the faid " commission, as the law in " fuch cases requires, be en-" larged for the space of forty-" nine days, to be computed " from the 66 of 1769.

" And your petitioner (as in duty bound) shall ever pray, &c."

(a) That is, by perfonally delivering to the commissioners, or leaving at their respective houses or places of abode, an examined and true copy of the said petition, with the order of the lord chancellor thereon.

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It has been thought adviseable, (but we do not think it at all necessary) for the bankrupt not to surrender himself till the expiration of his enlarged time, in case he conceives the commission to be injurious to him, or taken out illegally, in this case, after the allegation that the commission is issued, and party declared bankrupt thereon, and of the several days and times for his surrender, add the following allegations, viz

"That no debt is due to the petitioning credi-

" tor."

"That your petitioner preferred his petition to your lordship, praying that the said commission

might be superseded, whereon many affidavits

were filed, but fuch petition was dismissed with-

" out prejudice."

hou semon that sais rabau

"That your petitioner, hoping that fuch com-"mission would be superseded, hath not persectly adjusted his affairs."

#### Or thus,

- "That your petitioner having obtained your lordship's leave to bring an action at law to try
- " the validity of the petitioning creditor's debt,
- 44 and of the act of bankruptcy, pretended to have
- been committed by your petitioner, for that rea-
- of fon hath not yet furrendered himself, in order to be examined by, and before the said com-
- " missioners, touching the disclosure and discovery
- " of his estate and effects, under the faid commis-

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" In the matter of Francis Gibbons,

" bankrupt."

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" To the right honour-" able, &c. [as in the " other petition."]

The humble petition of John Partridge [ Sole affigues, if fo] or, and Charles Dennis, affignees of the offate an effects of the faid bankrupt.

Sheweth,

"That a commission of bankrupt under the " great feal of Great Britain, bearing date at Well-" minster, the day of May last, upon the " petition of Charles Jones, of High Holborn, in the county of Middlesex, mercer, was awarded and iffued against Francis Gibbons, of the city of Lon-" don, merchant, which commission was directed " to Thomas Nugent, John Fenshawe, Champion Bran-" fil, esquires, Richard Wood and Thomas Life, gen-

" tlemen, as commissioners to execute the same. " That the faid Francis Gibbons hath been de-" clared bankrupt, by the major part of the faid " commissioners acting under the said commission, " and by fummonce under their hands, and also " by notice in the London Gazette, on Tuesday the 66 day of May 1769, was required to " furrender himself to the said commissioners, or

" the major part of them, at Guildhall, London, " to be examined by them on the 10th and 20th

" days of the faid month of June respectively, at " four of the clock in the afternoon, on each of

" the faid days, touching the disclosure and disco-" very of his estate and effects, and on the 5th day

" of June last, the said bankrupt was by such sum-" monce and notice, required to finish his exami-" nation, under the faid commission.

" That the faid bankrupt, (or the faid Francis " Gibbons) hath not yet furrendered himself to the " com" commissioners in the faid commission named, or to the major part of them, at the faid two first

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- fittings already had under the faid commission,
- " and the faid bankrupt is now at Paris, in the kingdom of France, and intends to surrender
- himself to the said commission, as your petitioners
- are informed, but will not be able to arrive in.
- London by the 5th day of July."

#### Or thus :

- That your petitioners have been duly chosen affiguees of the estate and effects of the said.
- bankrupt, and find that the faid bankrupt is in an ill state of health, and a prisoner in the Fleet,
- and is not prepared to finish his examination, in
- the time limited for that purpose, in the manner prescribed by the act of parliament in that case
- " made and provided, therefore hath not as yet
- " furrendered himself to the said commissioners,
- which he purposes to do, as your petitioners are informed, as soon as his said examination can be
- "informed, as foon as his faid examination can be prepared."
- In case the bankrupt hath already had time, but not the full forty-nine days, then you set forth the commission, the commissioners declaration of the bankruptcy, the terms for surrender, (as before), and then the last order for time, thus,
- "That the said bankrupt being then in an ill state of health, and a prisoner in the Fleet, and
- " not being then prepared to finish his examina-
- "tion, your petitioners who have been duly chosen assignees of the said bankrupt's estate and effects,
- on the day of Jast pre-
- " ferred their petition to your lordship, and ob-
- tained an order thereon, for forty days further
- " time, to be computed from the day

of for the faid bankrupt to furrender " himself, and finish his examination."

"That your petitioners find, that the faid bank-" rupt, by reason of his ill state of health, as afore-" faid, hath not been able to prepare and complete " his examination, and in as much as the time " granted by your lordship, for the said bankrupt " to finish his examination, will expire on the

66 day of next;"

day of 1768. Let the time for the faid Francis Gibbons the bankrupt, his furrendering himself to the commissioners in the faid commission named, or the major part of them, and for disclosing and discovering his estate and effects, and finishing his examination before them, be further enlarged for the space of ten days, to be computed from the day

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bner lay of of next: hereof give notice to commissioners forthwith.

Camden, C.

"Your petitioner, there-" fore most humbly prays " your lordship, that the " time for the faid bank-" rupt, his furrendering " himself, and disclosing " his estate and effects to " the acting commissioners " in the faid commission " named and authorized, " and for his finishing " his examination before " them, may be further " enlarged for the space " of ten days, to be com-" puted from the faid day of next.

> " And your petitioner " shall ever pray, &c."

> > " Petition

#### Second Sitting

. 66	Petition for bankrupt's being ex-
niwe	amined before the commissioners,
200	on the special circumstances of
odi	bis case, after the expiration of
	" the forty-two days, though be
nsd,	bad not furrendered, or pro-
, Sett	" cured any enlargement of time
1 . 18	with the order thereon."

" Francis Gibbons, " able, &c.

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In the matter of "To the right honour-

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" bankrupt."

" The humble petition of the faid Francis Gibbons,

" That a commission of bankrupt, bearing date

uniefe e da co conevan

re-lande. Vont pontes.

#### " Sheweth,

" at Westminster, the and bas day of agree to " 1769, was awarded and iffued against your peti-" tioner, then of the parish of in the " county of dealer and chapman, on the application of A. B. and C. D. then of the er parish of aforesaid, and partners, " your petitioner's creditors, and was directed to certain commissioners therein named, the maor jor part of whom declared your petitioner a " w bankrupt. To sale of mid to w reveal. " "That by the commissioners summonce, and " also by notice inserted in the London Gazette of

to the presthe 2 19401 day of the que 12.176 your petitioner was required to furrender himse felf before the major part of the commissioners " acting under the faid commission, on the aun "

" and has days of notified moy then pext, "in order to be examined from time to time,

touching the disclosure and discovery of his -estate " estate and effects, and on the day
of then next following, your petitioner was by such summonce and notice to
finish his examination under the said commis-

"That such commission of bankrupt was so " taken out against your petitioner, without his " knowledge or privity, and that previous to the " iffuing of the same, your petitioner being in in-" folvent circumstances, and being arrested at the " fuit of a creditor, for the sum of ten pounds or " thereabouts, and your petitioner being afraid " that unless he raised the money to pay and dis-" charge the same, he should be detained for larger debts, your petitioner with great difficulty raifed " money sufficient to pay and discharge the same, " and immediately upon getting discharged from " fuch arreft, and for fear of being again arrefted " for larger debts, and put into goal, your ceti-" tioner, on or about the day of " house, in the parish of

"absconded, and went away from his dwellinghouse, in the parish of aforesaid,
and lest his wise and family there, and went
over to Calais, in the kingdom of France, where
he arrived on or about the day of the
fame month of but your petitioner
did not take any money, goods, or other effects
whatsoever, with him to Calais oforesaid, save
and except the sum of two guineas, or there-

"That upon your petitioner's fo leaving his faid
place of abode in London, as aforefaid, he gave

" orders and directions to his wife to come after

" him. od:

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"That your petitioner's faid wife and family did, in pursuance of such directions from your petitioner as aforesaid, leave his faid house the day

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day after your petitioner departed from thence, and came to your petitioner at Dover, and your

" petitioner and his faid wife and child went from Dover to Calais, and from thence to Saint

" Omer's in French Flanders, where they stayed for

" about three months.

"That about two months after your petitioner arrived at Saint Omer's as aforesaid, he received " a letter from a friend in London, informing him that a commission of bankrupt was issued against him, but your petitioner not taking with him more " than two or three guineas when he left his faid "dwelling-house in London, as aforesaid; and hav. ing contracted feveral debts at Saint Omer's, for " the necessary subsistence of himself and family, " was rendered on account thereof, incapable of coming away from thence, until he had paid and fatisfied the fame, and not having wherewith fo to do, your petitioner was obliged to beg " and crave the charitable affiftance of persons there, to aid and affift him therein, which with es great difficulty he procured, and immediately fet out for England, and upon coming to Calais and " fending for a Gazette, to his great surprize found, that the day appointed for his last ex-" amination (to wit) the day of

was elapsed, and had expired several days, notwithstanding which your petitioner

fet out and came over to England, and begged his way up to London, where he arrived in or

about the beginning of the month of

· 176 .

" That your petitioner upon his arrival in " England, made many applications to the affignees and creditors under the faid commission, ac-

quainting them of the circumstances of your

petitioner's case, and that he was ready and willing

" willing to fubmit to the commission, and con-" form himself thereto, some of whom were and of still are willing to relieve your petitioner, if " poffible, from the pains and penalties he may be " fubject to, for not furrendering to the faid com-" missioners in due time, and others are rigid and " threaten to profecute your petitioner, notwith-" flanding your petitioner hath been informed, " and verily believes, that the clerk under the faid " commission, proposed to petition your lordship " for further time to furrender to the faid commif-" fion, but they would not give him their con-" fent thereto, which if they had, your petitioner " would have been in England in due time (a). "That your petitioner is now defirous, not only 46 of furrendering himfelf, and of being examined,

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" as the acting commissioners shall think fit, but " he is also willing to submit himself, and to finish " his examination, before the acting commission-" ers, whenever they shall they shall think fit to " fix and appoint a meeting for that purpose."

> "Your petitioner therefore most humbly " prays your lordship, that you would " be pleased to order the major part of " the commissioners, named in the " faid commission, forthwith to ap-" point one or more meetings, at fuch " times and place as they shall think " proper, for your petitioner to appear " " and furrender himself before them, " " and to make a full disclosure and " discovery of his estate and effects, and also to finish his examination

(a) This allegation, chiefly, induced his lordship to relieve the ankrept. that he was ready

" under

"" under the said commission, and to
"" order the said commissioners to
"" cause due notice of such meeting or
"" meetings to be given in the London
"" Gazette, that such of your petitioner's
"" creditors as shall think proper,
"" may be present at your petioner's
"" examination, and that your lordship
"" would be pleased to direct the com"" missioners to enter on their proceed"ings an account of the cause which
"prevented your petitioner from sur"rendering himself and finishing his
"examination, within such time as he
"ought ro have finished the same,
" or that your lordship will be pleased
"to make such order in this matter,
" for your petitioner's relief, as to
"your lordship shall seem meet."

"And your petitioner (as in duty bound)
"shall ever pray, &c."

## Order thereon.

After reciting the above petition, the order goes on

" Lord chancellor,"

" In the matter, &c."

thus: "Whereupon all parties concerned were ordered to attend me on the matter of the faid
petition, and counfel for the petitioner, and
of one of the affignees under
the faid commission, this day attending accordingly. Now upon hearing the said petition and
feveral assistances, and what was alledged on

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" both fides (no person attending on the behalf of the other affignee, although he was duly ferved with the faid petition, and my order thereon, as by the affidavit of appears) I do think fit, and accordingly order, " that the major part of the commissioners, named " in the faid commission, shall cause due notice to " be forthwith given in the London Gozette, apor pointing a time for the faid Francis Gibbons, the " petitioner, to furrender himself to the commis-" fioners, in the faid commission named, or the " major part of them, at the Guildhall of the city of London, in order to his being examined, touch-" ing the disclosure and discovery of his estate and " effects, and to finish his examination under the " faid commission, and any of the creditors of the " faid Francis Gibbons, the petitioner, as shall think or proper, are to be present at his examination, and " to object to the disclosure and discovery of his " effate and effects. AND I DO ORDER, that the " faid commissioners shall enter in their proceed-" ings, under the faid commission, an account of " the accident that prevented the petitioner, Fran-" as Gibbons, from finishing his examination be-" fore them, within such time as he ought to " have finished the same, and the said commissioners " to take fuch examination in purfuance of this

This special interposition of the great seal, does not seem to be at all warranted by any of the powers or authorities in the bankrupt laws; the particular circumstances of this case might have been a proper desence on a criminal prosecution, not that we think it would have availed the bankrupt even there. Such a convict indeed might succeed in his application to the crown for pardon: however, as long as the bankrupt laws are suffered to remain in

their present form, no bankrupt can be (a) legally convicted thereon for felony.

### Affidavit of the Service of a Petition.

week some the const

a In the matter of Francis Gibbons, bankrupt.

Robert Richardson of, &c. gentleman, maketh

oath, that he this deponent did, on the

ferve Thomas Nugent and ce day of Gobn Fenshawe, esquires, and on the

Thomas Life, gentleman, with a

ce petition preferred by John Partridge and Charles Dennis, affignees of the estate and effects of the

66 faid Francis Gibbons, the bankrupt in this matter.

to the right honourable the lord high chancellor

of Great Britain, with his lordship's order there-

on, bearing date the day of the faid

46 month of whereby it was ordered,

that the time for the faid Francis Gibbons the

"bankrupt's furrendering himfelf to the commil-

" fioners, in the faid commission named, or the

" major part of them, and disclosing and discover-

" ing his estate and effects, and finishing his last

" examination, be further enlarged for the space

of ten days, to be computed from the

es day of next, (whereof notice

was forthwith to be given,) in manner follow-

ing; that is to fay, by personally delivering to

" the faid Thomas Nugent and John Fenshawe re-

spectively, a true copy of the said petition, and

order thereon; and at the same time shewing

them respectively the said original petition and

order thereon, and by leaving another true copy

of the faid petition and order thereon, at the " house of the said Thomas Life, in Basinghall-

(a) See fol, 225.

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(a) At

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" firet, London, with his clerk, agent or partner there; and at the fame time thewing fuch clerk,

" &c. the faid original petition, and order thereon.
"And this deponent further faith, that the faid

" Thomas Nugent, John Fenshawe, and Thomas Life, are the acting commissioners, under the faid com-

" mission, as this deponent hath been informed,

" and believes."

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Areet,

" Sworn at the public office

" in Symonds-Inn, this day of

Robert Richardson.

" before me

Lord Chancellor (a) Hardwicke by no means liked the practice, which he said was what attorneys in the country were very apt to fall into, in drawing an affidavit of the service of this petition, viz. to recite therein the whole petition verbatim, in order to swell up the expence, but that if they made a custom of it, he should, for the future, order the costs of the affidavit to come out of their own pockets.

Notice of the enlargement of the bankrupt's time must be given in the Gazette.

## Third Sitting at Guildball.

As creditors may prove or claim debts at this firating also, the folicitor will rake care to be provided with some printed depositions in blank; but the chief business of this sirting is for the commissioners to take the bankrupt's last examination. We will suppose that the bankrupt has obtained an order for surther time, and that the commissioners have been

<sup>(</sup>a) Ath. Rep. 139. pl. 79.

duly served therewith; if so, the sollowing mems.

Memorandum of the bankrupt's having enlarged his time for furrendering, and making a full disclosure and discovery of his estate and effects.

At, &c.

" Be it remembered, that this being the day ap. pointed, pursuant to notice in the London Gazette, of for Francis Gibbons of, &c. the person against whom the commission of bankrupt, now in pro-" fecution, is awarded and iffued, to furrender him-" felf, and to make a full disclosure and discovery of his estate and effects, and to finish his exami-"" nation under the faid commission, we whole " names are hereunto fubicribed, being the major part of the commissioners in and by the faid com-"" miffion named and authorized, met the day and year, and at the place above mentioned, pursuant " to fuch notice; at which time a petition from the laid bankrupt, (or from the atlignees in behalf of the faid bankrupt,) referred to the right "honourable the lord high chanceflor of Great Britain, praying that his (or the faid bankrupt's) time for furrendering himfelf, and making a full disclosure and discovery of his estate and effects, and to finish his examination, might be enlarged, (of further enlarged) for the space of days, to be computed from this mines day of things " instant, with his lordship's order thereon for that ce purpole, bearing date the day of " laft; was produced to (having been before ferved on) (or ferved on) us the laid commissioners;

we the laid commissioners do therefore defer tak-

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" ing fuch examination till the faid day of next; and we hereby accordingly adi journ to that day, at this place, at o'clock
in the afternoon of the fame day for that purpole."

Thomas Nugent,

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Thomas Nugent, Champion Branfil, Thomas Life.

If the bankrupt happens to be a prisoner, then you prepare a memorandum of the commissioners adjourning to the prison, in order to take his examination.

## \*\* felf, and to make a fall discipline and discovery

"Memorandum, that we, whose names are hereunto subscribed, being the major part of the
commissioners named and author zed in and by
a commission of bankrupt awarded and issued
against Francis Gibbons, ot, &c. met here the day
and year, and at the place abovementioned, pursuant to notice in the Landon Gazette, in order
to finish the said bankrupt's last examination;
but the said bankrupt being a prisoner in the
King's Bench prison in execution (or in a very
ill state of health, and not able to attend here to
be examined) we do therefore adjourn to the
said prison of the King's Bench, to take the said
bankrupt's Examination."

In the second of the second of the second for that day of the second of

" we the faid commissioners do therefore defer tilk-

· houthold goods, utenfils, flocks in trade, effates Memorandum of the Bankrupt's Exemination and " now in the pollett. viscosita affignees cholen un-

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er the faid commission, or one of them, and At the King's Beneb prison, in St. George's Fields, in 5 the county of Surry, by adjournment from Guildball, London, the bas do day ofo a segui 1768. now also delivered up by this exactions Adam

Champion Branfilmont Memorandum, that Francis sieds lie to viewes 15 Gibbons and Adam Pierce of. &c. the persons against whom the commission of "bankrupt now in profecution, is awarded and if-55 fued, appearing (again) before us the major part Snof the commissioners in the faid commission nam-"ed and authorized in order to finish their exami-" nations pursuant to notice in the London Gazette. for that purpose given, and being now sworn and es examined, they speaking for themselves respecst tively for st each speaking for himself"] bupon se their oaths fay, that the feveral books fa) of ac-46 dounts numbered respectively in 2 &c and re-" fpectively figned by thefe examinants, and the feveral paper (b) writings hereenton annexed, " marked respectively with the letters (A) (B) &c." 46 and also respectively signed by these examinants "runder each column, and delivered by these exa-"Iminants, or one of theme at the time of this" "Atheir dexamination, and exhibited unto the mase for part of the commissioners, in the faid commiffion named and authorized; together with the except only such part of those estates and esfects

(a) The bankrupt's accounts finall be drawn up clear and latisfactory, and delivered up by them at the time of their examination, to the affigures, (whose duty it is to attend this fitting for that and other purposes) the laid accompts being first exhibited to, and figure by the

been laid out in the ordinary expence senofficings.

(Appears being ad of stepralated and yet que benevie de flum doing the stepralated of the proceedings from gainst stepralated that at the time of their former examinations. s houshold

nations

" houshold goods, utenfils, flocks in trade, effates "and effects feized and taken by the mellenger, and " now in the possession of the affignees chosen un-" der the faid commission, or one of them, and "alford strings, and notin monies, now deliwered up by this examinant Princis Gibbon, and " 80 rings, a gold watch and and in monies, " now also delivered up by this examinant Adam "Pierce; to the faid commissioners, do contain a " full and true disclosure and discovery of all these examinants, and of either of their effare and ef-" fects, both real and personal, and how, and in pag romains auferwhat manner, to whom, and Richard Wood, out upon what confideration, and imaxe right aline car what time or times they, or "either of them, have or hath dispoled of, affignded ow transferred any of his goods, wates, "merchandizes, monies, or other efface and effects, " (and all books, papers and writings, relating "thereunito;) of which they or either of them was "son were poffelled, or in or to which they or either" "of them was or were any way interested or inti-"tled, or which any person or persons had, or hath," "or have in truft for them, or either of them, or " for their, or either of their-ule, at any time be-"before or after the iffuing of the faid commission," " or whereby they these examinants or either of "them, their or either of their families, hath or "have, or may have, or expect, any profit, possi-"bility of profit; benefit or advantage whatfoever, " except only fuch part of their estates and effects "as have been really, and bend fide before fold, or " disposed of, in the way of their trades and deal-"ings, and except fuch fums of money, as have " been laid out in the ordinary expence of them" felves and families. And these examinants sur-" ther fay, that at the time of their former examiproupor sa U 3 nations.

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Unations, and at this the time of their last exami-Honations, they have respectively delivered up to Mushe faid commissioners, or the major part of them, Shoor conheir affigness, all fuch part of their thefe frewaminants goods, wares, merchandizes, monies, estates and effects, and all books, papers and writings, relating thereunto, as at the time of " fuch their former examinations were, or now " are in their or either of their poliefions, cuftose dies or powers, (the necessary wearing apparel of thele examinants, and of their wives and and thefe examinants ar further fay, that they have not, nor hath either of them, removed, concealed or embezzelled any or part of their or either of their effates, real, or perfonal, or any books of accompt, papers of bereifinimis discussoritings relating thereto with Thomas Life of intent to defraud their or either of the distribution of their creditors that he

It is usual for the commissioners to recommend, and the creditors to agree to return the bankrupts their tings, monies, &c. particularly the jewels, &c. sofuthein wives; upon which occasion the following of the bath and the following of the father the f

BE IT REMEMBERED; that by the confent of the affiguees and creditors present the abovementioned tings, monies, and watches were redelivered to the bankrup:

does not understand English, it will be necessary that he should have the English examination interpreted, and read to him in the language he under trans.

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flands, by a person versed in both languages, who must be first sworn to interpret truly, of which oath and interpretation there must be a memorandum made and annexed to the bankrupi's examination. This deposition may be drawn up in the following form.

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" fue a cheir former examinations " James Horne, of, &c. being fworn and exa-" mined, on the day and year, and at the place a-" bovementioned, before the major part of the com-" missioners named and authorised in and by a commission of bankrupt awarded and issued, and now in profecution against Francis Gibbons, of &c. upon is his oath faith, that he hath faithfully and truly, " according to the best of this examinant's skill and knowledge, interpreted the oath administered by the faid commissioners, to the faid bank-" rupt. And this examinant further faith, that he " hath faithfully and truly, according to the best " of this examinant's skill and knowledge, interpret-" ed to the faid bankrupt his last examination here-"unto annexed "enofit in goo see sal frage at

It hath frequently of late been made a great question at Guildball, whether a bankrupt, who comes to faith his examination before the commissioners, is protected, after he hath passed the same, that whole day from arrest, by virtue of the summons of the commissioners? because, since, after the banktupt hath completely finished his examination, the power and authority of the commissioners over his person ceases, so consequently is their protection of the bankrupt, assis argued, that being allowed him something personal particular purpose allowed him to the dame particular purpose as some and a continued to discuss this very important specifical against additional particular purpose.

or action, which wantities brid belivered to the ora

The instances of (a) parties to suits, (b) jurors, and (c) witnesses being privileged and protected from artells in going to, attending on, and returning from courts of justice, are innumerable, as appears in the notes; and the reason for granting this The call privilege of protection hath been declared to be, that (d) fince parties to fuit, &c. are obliged to appear by the process of the court, the court will not fuffer thy offe to be molefled, while he is paying bedience to their witted

We will now lay before the reader fome cafes in point, and the first we shall consider is the case of

Platch and Buffer sig

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The plaintiff being a butcher, (e) brought an acfrom against one Theherne, for meat delivered into his family; the cause was tried at Winchester affizes: we man, who lived in the house, to swear that the meat was sent in ucon her credit, and that she was the debtor. Traberne produced the now defendant Bliffet, an old

The trial ended on Friday about four o'clock in the afternoon, the winnels (f) flayed at Winchefler till after dinner on Saturday; and in the evening about feven, as fhe was going home in a coach to Portimouth, which was twenty miles off, the defendant was arrested by (g) Latitat, for the fame cause

(v) Comb. 25. Barnard. B. R. 251. 262. Andr. 275. 2 Str. 1094. Pract. Reg. C. P. 50. 51. 341. Barnes, 17. 822 85(a) Suplem. to ILM. 12. pl. 30 Myda Rep. 66e pl. 13. bial Lal. Abr. 455. 249a. Pract. Reg. Chanc. 289. at Reb. Curl. Canc. 49600 Teth. 248. tion the fittings, louers by the way to drink a por in erre sign and othermined; this case the court correcte cash and traffic (t) the design before third walles, a special court of the c 2 Tri. per Pais. 382. Leid Chancellor Camden, (when Ch. Juft, C. 808 da Challed Lowitnels on the circuit, who was arrested on the sandsquare like he evidence, and was extremely first in the riskognish Doction Concern. of DOG

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(a) 23(6) Ipect: from is de plain bankı (0,

Lord nels e evide of action, which write was not delivered to the the riff till the day of the arreft.

Motion, upon the protection of a witness in going to and returning from court, that an attachment might iffue against the plaintiff, and bailiff.

This motion was oppoled, for that, though witness had free liberty of going and returning, yet that it did not extend to as long a time as the thought proper to take; that Parimoulb was but twenty miles from Winchester, and the defendant might have been at home much fooner; that the was an old woman, who lived in a garret, and never to be met with, but was brought down to the affizes, merely to fwear plaintiff out of his debt.

The court, notwithstanding all these objections, held, that Biffet ought to be discharged, her protection not being (a) expired; and that witnesses ought to have a reasonable time to teturn home in, and were of opinion that one day was the least time that could be allowed, and that they could not try all the niceties of delays which might poffbly happen, and that a little deviation or (1) loitering on the way, would not affect the protection of a witness.

It was further fa d by the court, that had the arrest been at the assizes, the judges there might (4)

(v) Coch, 291 Bennud B. R. 251, 262. Ande 205 C. P. 50. 51: 341. Pares 98725 25 (1)

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Ber. (b) It was faid by Serjeant Print (Gord Canden's father, of respeciable memory ) at the bury that in Middle ex, if a witness returning from the fittings, loiters by the way to drink a port his protect is determined; this case the court observed concluded against is determined; this case the court observed concluded against the plaintiff, by thewing a design. Gilb. Cas. 306. See Hindelines, (a bankrupt) his case hereafter. fol. 440.

(t) Lord Fortefeue reports' the contrary. Fortefe. Rep. 194 but Lord Chancellor Camden, (when Ch. Just. C. B.) discharged a wanness on the circuit, who was arrested on the same day he gave he evidence, and was extremely strict in his reprimend of the officer, have discharged her; because (a) privileges given by law are to be projecuted in such a manner, as the party may most easily have the benefit of

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them disays) (a) in bettoger of his county to the county of twelft of the parties agreed in education of the parties agreed in education we have been his thereo locaking of appears to have been granted by courts of julius only, it may be objected, that as commissioners of bankrupt do not constitute a court of tutlice they are consequently not invested with of justice, they are confequently not invested with the power and authority contended for; but in order to obviate such objection, we will make a di-

It hath been faid, but we think erroneously, that commissions of bankrupt are a (c) branch of the fioners of bankrupt, when litting in execution of the commission, constitute a court of justice; and derive their authority from act of parliament, and only their appaintment from the great feal; my lord (a) Coke styles them, "The court of commissioners upon the statute of bankrupts." And it is observable, that his lordship, in his next chapter (LXIV.) describes commissioners to examine witnesses. "Commissioners for examination of witnesses," and not "The court of commissioners melics, and not "The court of commillion-

The court of commissioners of bankrupt is ameliable and answerable for their proceedings, to the

and very liberal in his protection of the witness declaring, that he would not oblige him to go immediately and directly home. And fee Hincheseman (a bankrupt) his case hereafter. I Fel. 440-

Set off. Eyes, Cruper, Fortefene Aland, desends and 4 fts) ...
whith Compress and Thompson, of the Exchange, egg. less did (4)
(4) Forter Reg. 16 are plainteness grand to exofilimmen study (2)

<sup>(</sup>d) 4 toft. 277. Bornet B R. 448. Caf. Temp. Hardw. 35 trang Act. Rep. 54. pl. 27.

great feal, in like manner as other inferior courts are to the fuperior opes, at Wellminfter.

The next case we adduce for confideration, is that of Holiday and Pitt, reported in (a) feveral books; which, as far as it is applicable to the present oc.

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Pitt, a member of parliament, was arrelled two days after the difforntion, whereupon he moved the court of King's Bench to be discharged, for that he was privileged redeundo, notwithstanding the diffolution, and that two days were not a fufficient time for him to return home in ; and eleven (3) judges were unanimously (c) of opinion with the detendant, and for the reasons above stated.

The next cale is that of Kerney, which we will

flate as far as it affects the point in question.

Kerney, (d) who had been an affignee under z commission of bankrupt, was discharged by order of lord chancellor. Hardwicke, and directed to convey to new affignees, and to accompt feven cays after he had conveyed to the new affignees, and had

paffed his accompts.

Kerney being an incumbered person, begged the commissioners would give him their summonce, for the next fitting, under the commission; the commiffioners told him, that as he had done every thing that was necessary, in pursuance of my lord chancellor's order, it would be of no use to him, but however, upon his importunity, they did give him their fummonce. 19 14 fill

(d) Atk. Rep. 54 pl. 17.

<sup>2</sup> Bernord, K. B. 422, 433, 448. Col. Temp. Hardre. 28, (b) Vis. Lord Hardre Page, Fredyn) and Lee, of B. Re-

Sir. 977. Eyre, Couper, Fortescue Aland, and Reeve, of C. B. Rynolds, Comyns, and Thompson, of the Exchequer.

(c) Fortes. Rep. 1662 2 Sir. 9882 Com. Rep. 2242 pt. 2021 2

Barnard, B R. 448. Caf. Temp. Hardav. 35.

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Kerney attended on the day mentioned in the fummonce, and was examined two hours; as he was returning home, a sheriff's officer arrested him, and not withstanding Kerney she wed him the commissioners summonce, he kept him in custody sevedrely ought to h ral hours.

Kerney applied to lord chancellor Hardwicke, to be dicharged from the airest, who advised the she-Till's officer to discharge Kerney talling and ashe

The last case and most in point is one (a) Hin-cheseman's, a bankrupt, which was this:

Hincheseman, a bankrupt, after he had attended the commissioners, after he had finished his examination, and after he had left the inn, where the commissioners fat upon the commission, was arrefted before he got home, which was above forty

It appeared, that the clerk to the commission. and others, had prevailed on the bankrupt to go and drink, with whom he flayed till half an hour past twelve o'clock at night, at which time, an ofneer came into the room and arrefted the bankrupt, who, for want of bail, was carried by him to the county goal; whereupon the bankrupt petitioned the late lord chancellor Northington, to be discharged, which was granted accordingly, and his lording also ordered the bankrupt the protection of the court home.

The late lord chief justice Lee (b) faid, that if a party to a fuit was fuffered only to be ferved with process, attending a court of juffice, it would produce much terror and great diffraction in bufinels.

the express words of this clause " at state to

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As the law make Trauned agd January 1784. (4) leged the whole day on which he h endre nibn Add tion or

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Though the modern politenels of courts of juftice hath (a) rejected the opprobrious term, a " eriminal" or " offender," with which bankrupts were (b) formerly fligmatized; yet we prefume to look upon him in that light, for his own fake, and as fuch therefore, he furely ought to be free from all terrar on his mind, while he is passing to folemn and fo penal an act, as his final examination; befides, the legislature (r) hath expressly declared, that, in order the better to enable bankrupts to make a full and true discovery and disclosure of their effates and effects, they shall be free from all arrefts, restraint, and imprisonment, of any of their creditors, in coming to furrender, and from their actual furrenders to the commissioners, for and durring the forty (4) two days, or fuch further time as shall be allowed them for finishing their examinonations, Sterk

og of If the doctrine prevails, that a bankrupt is not protected, ufter he hath furrendered, and finished his examination, we thall have commissions of bankrupts illue on purpole to give an unconscionand able creditor, an opportunity of laying hold of the person of an unfortunate bankrupt, after he hath delivered up his all. But to conclude:

bolt is submitted therefore, whether any other inofference can be fairly drawn from the above premifes than. the court home.

The late lord chief juffice Lee (b) faid, that if a (1) W (r) Att. Rep. 219, 220, 240, 2 Att. Rep. 528. Bur. Rep. 31.

(b) Stat. 1 Jac. c. 15, fect. 17. Show. Rep. 516, 517. 8 Mod. 47.

Art. Rep. 77. 2 Burr. Rep. 317.

That

<sup>(</sup>c) Stat. 5 Geo. 2. c. 30. fect. 5.

(d) As the law makes no fraction in days, Cal. Temp. Halt, C. J.

195. 2 Salk. 525. pl. 3. ford Raym. 486. the bankrupt feems privileged the whole day on which he hath given in his examination, by the express words of this clause of the flatute, F hough

nation before the commissioners, after he hath finished the same, is protected that whole day from arrest, by virtue of their summonce but a said and

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## Copy of Perrott's warrant of commitment.

305 At Guildhall, London, 19th April, 1760.

Whereas his majesty's commission under the great feal of Great Britain, bearing date at Weft. minfler, the 19th day of January last past, " grounded upon the feveral statutes made con-"cerning bankrupts, bath been awarded and iffued " against John Perrott of Ludgate bill, Landon, mer-" chant, directed unto us who have hereunto sub. "foribed our names and fet our feats; who have "also respectively taken the oath appointed by an " act of parliament, passed in the fith year of his oresent majesty's reign, intituled, sa An (a) Act " for the better preventing frauds committed by " bankrupts," for commissioners of bankrupts to "take before they act as commissioners, in the ex-" ecution of the powers or authorities given and " granted by the faid act or acts of parliament now in force concerning bankrupts, and to Charles " Nelson Cole, efq. and Arthur Trollope, gentleman, being the major part of the commissioners named " to execute the faid commission; and it having so appeared to the major part of the faid commis-" fioners in the faid commission named and autho-" rized, upon good and fufficient proof upon oath, " that the faid John Perrott hath, from the month " of July 1758, carried on the trade and business " of a merchant, in his house on Ludgate hill afore-" faid, by buying and felling linens, lace, and other wares and merchandizes, and by exporting "and importing divers and fundry kind of goods, (4) This act is mifrecited. See our remarks thereon in fol. 219.

and hath thereby fought, and endeavoured to " get his living as other merchants usually do ; " and in the course of his said trading and dealing, " he became indebted unto William Hewitt, of " Newgate-freet, London, warehouseman, in the " fum of 106 L and upwards, for goods fold and " delivered and also have found upon good proof, " upon oath, that the faid John Perrott did, before "the date and fuing forth of the faid commission. " become a bankrupt, within the true intent and " meaning of the feveral flatutes made and now in " force concerning bankrupts, some one of them. "And they did adjudge and declare him a bankrupt

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" accordingly; avait only to once before by thema "And whereas the major part of the faid com-" missioners did cause notice to be given in the London Gazette, of the 22d day of January last past, "that the faid John Perrott was thereby required to " furrender himtelf to the faid commissioners in the " faid commission named, or the major part of "them, on the 26th of January, and on the 4th " of February last past, and on the 4th of March " laft, at four of the clock in the afternoon, on "each of the faid days, at Guildhall, London; and " make a full disclosure and discovery of his effate " and effects. And whereas the faid John Perritt " did, on the faid 4th day of February laft, furren-"der himself to the major part of the commission-"ers, in the faid commission named and autho-" rized; but being fworn and examined, faid that "he was not then prepared to make a full difelo-" fure and discovery of his estate and effects, but "prayed time for the doing thereof, which was " granted to him accordingly. And whereas the faid John Perrett attended the major part of the com-"missioners, in and by the faid commission named " and authorized, on the faid 4th day of March, DDE 33

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stin order to finish his examination, and to make " a full disclosure and discovery of his estate and " effects, but producing to the faid commissioners, " an order of the right honourable Sin Robert Hen-" ley, knight, lord keeper of the great feal of Great " Britain, dated the 28th day of the said February, 1760, for enlarging the time of the faid John " Perrott for discloting and discovering his estate, " and finishing his examination for the space of "46 days, to be computed from the faid 4th of " March, to this day. And whereas the faid John " Perrott attended us on this day, in pursuance of " of the faid order, in order to finish his examination, and to make a full disclosure and disco-" very of his estate and effects, and being then and " there duly fworn and required by us to make " fuch disclosure and discovery; we the faid com-" missioners did cause the following question in " writing to be propounded to him the faid John Perrott, (that is to fay) " As you do admit that "you have spent the last week, previous to this "your examination, with Mr. Maynard, one of " your affignees, to fettle and adjust your accounts, " and to draw up a true flate thereof, to enable you to close such your examination; and do likewise admit that upon such state thereof, it appears, that after giving you credit for all If fums of money paid by you, and making you a " debtor for all goods fold and delivered to you, " from your first entering into trade to the time of of your bankruptcy, it appears, that there is a de-" ficiency of the fum of 13,513 1. Give a frue and " particular account what is become of the same, " and how and in what manner you have applied " and disposed thereof. To which question so put " by us, as aforefaid, the faid John Bernett did " wilfully and obstinately sefule to gire any other asd his deputy there.

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the order to finish helpdhing the ion, and to ma than the following general answer, (that is to " fay) that on goods fold this last year I have lost "upwards of 2000 %. and by mournings Those upwards of 1000/. and that for nine of ten years "I have, I am forry to fay it, been extremely ex-" travagant, and fpont large fums of money. Perrott. Which answer of the faid John Per-" roll not being Jatisfactory to us the laid commis-" fioners, Thele are therefore to will, require, " and authorize you immediately, upon receipt hereof, to arrest and take into your custody the body of the laid John Perrott, and him fafely to "convey to his majeffy's prison of Newgate, and him there to deliver to the keeper of the laid pri-" fon, who is hereby required and authorized, by " virtue of the commission and statutes aforesaid, to receive the faid John Perrett into his cullody, " and him fafely to keep and detain, without bail " or mainprize, uptil fuch time as he shall submit "himself to us the said commissioners, or the ma-" jor part of the commissioners, by the faid com-" mission named and authorized, and full answer " make to our or their fatisfaction, to the queltion " fo put to him by us as aforefaid. And for fo "doing this shall be your sufficient warrant." Given "under our hands and feals at the Guildball of the " city of London, this 19th day of April, in the " year of our Lord 1760." stoog lis 101 101deb " from our fift entering into trade to the time of To William Chesflyre, our as it yatquishaed moy " mellenger, or Robert F. Filmer, (L. 8.) Brown his affiltant. 21 15 Cr. Loffi, L. 8.)49 beilge avAndov sannen bad Wit. Grawky. [B.S.] and dilpo. Percol. To Richard P Akerman bickeeper of his majefly all chiefer eld fo refered wilful's and oblimately totulogory to aplied et to his deputy there.

If the bankrupt does not furrender himself to the commissioners by 12 o'clock at night, the messenger warns him so to do, by the following proclamation made by him in the middle of Guildhall.

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# The Proclamation. mill rebroined

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Francis Gibbons, Francis Gibbons, Francis Gibbons, come and furrender yourself forthwith, to
fohn Fenshawe, Champion Bransil, esquires, and
Richard Wood, gentleman, his majesty's acting
commissioners, named and authorized, in and by
a commission of bankrupt, awarded and issued.

a commission of bankrupt, awarded and issued, and now in profecution against you, the said

Francis Gibbons, the said commissioners being now present in the old council-chamber, in Guildhall,

London, ready to take your furrender; and this you are not in any wife to omit, on pain of death, the punishment by the statute made and now in

force concerning bankrupts, in that case on you the said Francis Gibbons institled."

If the bankrupt does not furrender himself after this proclamation and warning, then the commissioners fign the following memorandum.

Memorandum, when the bankrupt does not appear at all.

the credition are to affect to the field the als

Be it remembered, that we whose names are hereunto subscribed, being the major part of the commissioners, named and authorized in and by

a commission of bankrupt, awarded and ssued, and now in prosecution, against Francis Gibbons,

of, &c. met (ogeiher the day and year, and at the place above-mentioned, pursuant to notice in the the

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at in he the London Gazette, for the said banksupt to surrender himself to the major part of the commisfioners, in and by the said commission named and
authorized, and to make a full disclosure and
discovery of all his estate and essects, at which
time and place the said Francis Gibbons did not
furrender himself, according to an act of parliament passed in the fifth year of the reign of his
late majesty, king George the Second, intituled,
An Act to prevent the committing of frauds by
bankrupts; although we attended in expectation of such surrender, till past twelve o'clock at
night, and although the said bankrupt was warned by proclamation to surrender himself.

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on chers being now

Champion Branfil. Richard Wood. Thomas Life.

We have observed that the commissioners seem much displeased at the bankrupt's endeavouring at this sitting to get his creditors to sign their consent to the commissioners certifying the great seal of his conformity, though their own advertisement in the Gazette expressly says, that " at this suting the bank-" rupt is required to finish his examination, and " the creditors are to assent to, or dissent from the al-

# Letter of attorney.

As creditors may have occasion to appoint attor-

<sup>(</sup>a) With great deference we prefume to lay, that the word " bis" here should be " the commissioners;" for the creditors of the bankrupt authorize the commissioners; and not the bankrupe, to certify.

ns hour stages of the syncholistic and that the faid vytirodius " and that the faid vytirodius " may be discharged from his debts, in week and

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Letter of attorney to sign confent to the commissioners certifying the great seal, that the bankrupt bath conformed: and to confent to assignees commencing suits in equity, &c. and to receive dividends.

"KNOW ALL MEN by these presents, that we charles Jones of, &c. and Jahn Leigh of, &c. creditors of Francis Gibbons of, &c. the person against whom a commission of bankrupt is " awarded and iffued, and now in profesution, and "who have duly proved our respective debts under the faid commission, HAVE made, ordained, authorized, conflicted, and appointed, AND by " there prefents Do make, ordain, authorize, con-" stitute, appoint, and in our places and steads re-" spectively put Samuel Knebbs, of, &c., to be our " true and lawful attorney, for us and in our names " respectively to vote in the choice of any new af-" figuee or assignees, of the faid bankrupt's estate " and effects, in case of any alteration or change of " the present assignees. And Also for us and in our names, places, and steads respectively, to coner fent with whom the monies to be received from " time to time out of the faid bankrupt's estate and " effects, shall remain until the same be directed." " AND ALSO for us and in our names, places, and " Reads respectively, to consent to the commissioners " " in and by the laid commission named and autho-"rized or the major part of them, ligning a certificate for the faid bankrupt's having the allowance and benefit, given to bankrupts may at allowof parliament passed in the fifth year of the crigo. "
of his late majesty King George the Strang, in tuled." tuled,

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stuled, at An act to prevent the committing of " frauds by bankrupts," and that the faid bankrupt " may be discharged from his debts, in pursuance " of the faid act. AND ALSO for us and in our " names respectively to consent, not only to the " commencing of any fuit, or fuits in equity, by " the affignee or affignees under the faid commission, " touching the faid bankrupt's estate, but also to " the submitting of any dispute or difference be-" tween such affignee or affignees, or any other " person or persons whatsoever, for or on account " or by reason or means of any matter, cause, or " thing whatfoever, relating to the faid bankrupt's " estate or effects, and likewise to such assignee or "or affignees making any composition with any " person or persons, debtors, or accomptants to the " faid bankrupt, where the same shall appear neces-" fary and reasonable. AND ALSO for us and in " our names, places, and steads respectively, and for " our own proper ules and benefits respectively, to " alk, demand, fue for, and receive of and from the " affignee or affignees of the estate and effects of " the faid bankrupt, or whom elfe thefe prefents do, " shall, or may concern, all and every such sum and " fums of money, as now is or are, or which shall " hereafter become due or payable to us the faid " Charles Jones and John Leigh respectively, for our " respective dividends or shares of the estate and es-" feets of the faid bankrupt, on our faid respective " debts duly proved under the faid commission as " aforefaid, and on receipt thereof for us and in our " respective names to fign, seal, execute, and de-" deliver, all and every such good and sufficient re-" ceipts, acquittances, releales, and discharges to " the faid affiguees, as shall and may be lawful, fir " and convenient to be done, and generally to do " all and every fuch further and other lawful act epain?

### Certificate of Conformity.

The commissioners (a) certificate to the great seal, that the bankrupt hath conformed, in order to his being discharged from his debts.

"To the Right Honourable the Lord High Chancel- lor of Great Britain.

"(b) We whose hands and seals are hereunto subscribed and set, being the major part of the commissioners named and authorized in and by a commission of bankrupt awarded and issued against Francis Gibbans of, &c. bearing date at

(a) This is usually called "The Bankrupe's Certificate," but in apprehend erroneously, and therefore we presume to recommend the title we have given it above, for the reasons mentioned by in it fol. 447. in notes.

(b) See Clerk's Affistant. 1 vol. p. 126. The above is Lord Hat wicks's form.

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" Westminster the day of October, in the it ninth year of his present majesty's reign, directed to Themas Nugent, John Fenshawe, and Champion Branfil, elquires, Richard Wood and Thomas Life, gentlemen, DO HUMBLY CERTIFY to your lord-" fhip, that the major part of the commissioners, " by the faid commission authorized, having begun " to put the faid commission into execution, did find " that the faid Francis Gibbons became bankrupt " fince (a) the fourteenth day of May 1729, and " and before the date and fuing forth of the faid commission, within the true intent and meaning of the statutes made, and in force concerning 4 bankrupts, or some of them; and did thereupon " declare him bankrupt accordingly. AND WE " FURTHER HUMBLY CERTIFY to your lordship, " that the faid Francis Gibbons being fo declared " bankrupt, the major part of the commissioners, by " the faid commission authorized, pursuant to the " direction of the act of parliament made in the fifth " year of the reign of his late majesty, intituled " An act to prevent the committing of frauds by " by bankrupts," did cause due notice to be given " and published in the London Gazette, of such com-" mission being issued, and of the times and place " of three feveral meetings of the faid commissioners, " within forty-two days next after such notice,

(a) Stat. 5 Geo. 2: C, 30. f. 1. extends only to such as become backrupts after the 14th day of May, 1729, who are understood to be those against whom no comm stion of bankrupt was sued out before that sime; and if the certificate of the commissioners does not mention the party to have become bankrupt after that time, it ought to be disallowed for that cause, but it is, however, thought fit and actived, that before the certificate be disallowed, some proof be made by the creditors of the party's being bankrupt before that time. See the resolution of the judges upon statute of 4 and 5 of Ann. c. 15 in Serjeant's Inn, in Chancery Lane, Dec. 3, 1706. Sale, 112, 122.

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the last of which meetings was appointed to be " on the forty-second day, at which the faid Francis "Gibbons was required to furrender himfelf to the " faid commissioners named in the said commission, or the major part of them, and to make a full dif-" closure and discovery of his estate and effects; and " the creditors of the faid Francis Gibbons were de-" fired to come prepared to prove their debts, and to affent to or diffent from the making this certi-" ficate. AND WE FURTHER HUMBLY CERTIFY " to your lordhip, that fuch three feveral meetings of the major part of the faid commissioners, by the " faid commission authorized, were had pursuant to " fuch notice, fo given and published, and that at " one of those meetings, the faid Francis Gibbons did " furrender himself to the major part of the said " commissioners by the faid commission authorized, 46 and did fign or subscribe such surrender, and did " fubmit to be examined from time to time upon " oath, by and before the major part of the com-" missioners, by the faid commission authorized, and in all things to conform to the feveral fla-" tutes made, and now in force concerning bank-" rupts, and particularly to the said act made in the of fifth year of his faid late majesty's reign. AND WE FURTHER HUMBLY CERTIFY to your lord-" thip, that at the (a) laft of the faid three meet-" ings, the faid Francis Gibbons finished his exami-" nation before the major part of the faid commil-" oners, by the faid commission authorized, accord-" ing to the direction of the faid last mentioned ad; " and upon such his examination, made a full dis-" covery of his estate and effects, and in all things, " conformed himself to the several statutes made, " and now in force concerning bankrupts, and

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(a) Se

<sup>(</sup>a) See fcl. 417.

it particularly according to the directions of the faid " act made in the fifth year of his late majeffy's reign; and there doth not appear to us any reason to " doubt of the truth of fuch discovery, or that the " fame is not a full discovery, of all the estate and "effects of the faid Francis Gibbons. AND WE "FURTHER HUMBLY CERTIFY, that the credi-"tors whose names or marks are subscribed to the " certificate, are full four parts in five in (a) num-"ber and (a) value of the creditors of the above " named Francis Gibbons, who are creditors for not " less than twenty pounds respectively, and who " have duly proved their debts under the faid com-" mission; and that it doth appear to us by due " proof by affidavit (b) in writing, that fuch feveral " subscribing creditors, or some person by them " respectively duly authorized thereunto, did, be-" fore our figning thereof, fign this certificate, and " teffify their confent to our figning the fame, and " to the faid Francis Gibbons his having fuch allow-" ance and benefit, as by the faid last mentioned " act are allowed to bankrupts, and to the faid " Francis Gibbons his discharge, in pursuance of the " last mentioned act. In witness whereof we " have hereunto fet our hands and feals this

" day of October, in the ninth year of the reign of " our fovereign lord George the third, by the grace " of God of Great Britain, France, and Ireland, king, " defender of the faith, &c. and in the year of our " Lord, 1768."

Thomas Nugent, (L. S.) and the second water to Richard Wood, (L. S.) Thomas Life, (L. S.) Min's a manufacture of the

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his is notified absorbed. (a) See fol. 250.

<sup>(</sup>b) Or affirmation, as the tale happens,

cis Gibbons, whose names or marks are hereunto subscribed, do hereby testify and declare our consent, that the major part of the said commissioners by the abovementioned commission authorized, may sign and seal the certificate above written, and that the said Francis Gibbons may have such allowance and benefit, as are given to bankrupts by the act of parliament last above mentioned, and to the said Francis Gibbons his discharge, in pursuance of the same act."

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John Partridge.
Charles Dennis.
John Leigh.
Mary Combes.
Abraham Bentley.
George Adams, for felf and Co.
Thomas Folkes, for Edward Smith,
by letter of attorney.

Certificate where Bankrupt surrenders under Order for Time.

As in last at fol. 462 to "to be on the forty second day," inclusive, then continue the certificate thus:—" (but by your lordship's order bearing date the "day of last, the time for the said bank-"rupt his surrendering and finishing his examination, was enlarged for forty-nine days,) at which meeting the said Francis Gibbons was required to "surrender himself to the commissioners in the said commission named, or to the major part of them, and to make a full disclosure and discovery of his

estate and effects; and the creditors of the said Francis Gibbons were desired to come prepared to

prove their debts, and to affent to, or diffent from our making this certificate. And we further humbly certify to your lordship, that such several meetings of the major part of the commissioners, by the said commission authorized, were had, pursuant to such notice, and the order of your lordship; and that the said Francis Gibbons on the day of last, (being the forty-minth day of the enlarged time, under your lordship's order as aforesaid) did surrender, &c." in fol. 462. and so you, and conclude from the form of the other certificate, set out above, and at large.

Affidavit of seeing Creditors of Bankrupt sign their Consent to the Commissioners (a) Certificate, to be produced, and signed by the Commissioners.

" In Chancery.

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" In the matter of " Francis Gibbons,

" bankrupt.

"Peter Quin of, &c. maketh oath, that he did

"fee John Partridge of, &c. [describe bim according

"to his addition in the deposition of bis debt] Charles Den
"nis, of, &c. [the same] John Leigh of, &c. severally

"subscribe their respective names to a consent, at

"the foot of a certain instrument in writing, in
"tended to be a certificate under the hands and

"seals of the major part of the commissioners au
"thorized by a commission of bankrupt, awarded

and issued out against Francis Gibbons of, &c. that

the said Francis Gibbons hath in all things con
formed himself to the several statutes made, and

now in force concerning bankrupts, whereby they

do severally testify and declare their consent to the

(a) This is one of Lord Hardwicke's precedents.

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"faid commissioners signing and sealing the said certificate, and that the said Francis Gibbons may have such allowance and benefit as are given to bankrupts by an act of parliament made in the fifth year of the reign of his late majesty king George the Second, intituled, "An act to prevent the committing of frauds by bankrupts," and be discharged from his debts in pursuance of the said act."

" Sworn at the public office, &c. Peter Quin.

# The Affidavit where two Persons saw the Creditors sign.

"Thomas Andrews of, &c. and Nathaniel Owen,

&c. severally maketh oath as follows: and first

this deponent Thomas Andrews for himself faith,

that he this deponent did see (the names, places of abode, and additions of such creditors as signed according to their depositions as before,) severally subscribe their respective names, &c. (as in the above offidation); and this deponent Nathaniel Owen for himself self saith, that he did see (another creditor) sub-

" fcribe his name to the faid confent."

Sworn, &c. Thomas Andrews. Nathaniel Owen.

If a creditor at large of the bankrupt should happen to have his body in execution at his suit, at the time of issuing the commission, the commissioners will not admit such creditor to prove any debt under the commission; but yet, if such creditor is apprehensive that the bankrupt will, by reason thereof, obtain his certificate, and thereby deseat him of his execution, it is of course for the great seal, upon proper application, to order the commissioners to admit

admit fuch person a creditor for the purpose of asfenting to or diffenting from the commissioner's certificate of the bankrupt's conformity, fuch creditor waving all benefit of dividends under the faid commiffion.

The application to the great feal must be by pe-

tition to the following effect:

" In the matter of Francis Gibbons, Bankrupt.

" To the Right Honourable " the Lord High Chancellor " of Great Britain.

" The humble Petition of George Campbell, Esq.

" Sheweth,

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"That in or about Hilary term now last past, " your petitioner obtained judgment, in his majef-" ty's court of King's Bench, at Westminster, against " the said Francis Gibbons, for 5000l. debt, besides " costs of fuit.

" That on or about the day of

" now last past, your petitioner caused the said Fran-" cis Gibbons to be taken in execution on the faid " judgment, who now remains in the custody of " the marshal of the Marshalsea of the faid court

" of King's Bench, in execution of the faid judg-

" ment at your petitioner's fuit.

" That your petitioner has very great reason to " apprehend that the commission of bankrupt a-" warded and iffued, and now in profecution against " the said Francis Gibbons, was taken out merely

" with a defign, and on purpose to discharge the " faid bankrupt from the faid execution, and by

" that means to defraud your pet tioner of his faid

" debt and cofts.

"That under the circumstances of this case, your " petitioner is advised that he cannot be admit-

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et ted to prove his debt under the faid commission " without your lordship's order for that purpose,

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and without your petitioner waving all benefit of

"dividends made or to be made under the faid

" commission.

"Your petitioner therefore most humbly " prays your lordship, that he may be at " liberty to prove his faid debt under the " faid commission, and that he may be " admitted a creditor for what he shall so er prove, in order to enable your peti-" tioner to affent to, or dissent from, the " allowance of the commissioners certifi-" cate of the faid bankrupt's conformity; " your petitioner hereby waving all bene-" fit of any dividend already declared or " made, or which shall hereafter be declared or made to the creditors under the " faid commission.

" And your petitioner shall ever pray, &c."

The certificate being engrossed on a treble fixpenny stamped piece of parchment, the creditors having figned their consent thereto, and an affidadavit of feeing them fign fuch confent being made, the commissioners must be summoned by the mesfenger to meet in order to fign and feal the faid certificate; at which meeting they also fign this memorandum.

Memorandum of the commissioners certifying the bankrupt's conformity.

#### " At, &c.

Be it remembered, that we who have hereunto fubscribed our names, being the major part of the

" the commissioners named and authorized in and " by a commission of bankrupt, awarded and if-" fued, and now in profecution against Francis " Gibbons, of &c. did meet the day and year, and " at the place above-mentioned, and examined the " proceedings under the faid commission, and find-" ing that full four parts in five of all the creditors " who have proved debts under the faid commis-" fion, whose respective debts amount to twenty " pounds or upwards, have figned their confent to " our certifying to the lord high chancellor of Great " Britain, that the faid Francis Gibbons had con-" formed himself to the several statutes made, and " now in force concerning bankrupts, as appears " by affidavit exhibited before us; we thereupon " figned fuch certificate."

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Champion Branfil, Richard Wood, Thomas Life.

The (a) certificate, together with the affi avit of feeing the creditors fign it, and also letters of attorney,

(a) By an order of lord chancellor Appley, (which fee in fel. 263.) the commissioners are directed to transmit a separate certificate to the secretary of bankrupts, to be laid before his lordship at the same time with the above certificate, particularizing, whether the bankrupt was concerned in partnership, and in case the commission be joint, then the commissioners are to inquire very minutely into the joint and separate dealings; and also whether the party hath been bankrupt a second time, or been discharged under any insolvent debtor's act; and an inquiry by evidence for the above purposes is directed.

My reasons for not giving a form of such new separate certificate is, because it is not authorized by any of the bankrupt laws, my lord chancellor hath no authority by law for making such an order as above set forth; it is extrajudicial and unprecedented, it was made on the spur of the times; the commissioners cannot legally compel any witnesses to attend them on the inquiry in question, the same not being directed by any of the bankrupt laws; and for that reason, in case the commissioners should in any respect injure or oppress a bankrupt by such inquiry, he might well maintain his action against them a

torney, (if any such there be), must be lodged with the secretary of bankrupts, who will thereupon give the messenger an authority to the printer of the Gazette, to insert an advertisement therein, signifying that "the acting commissioners have certified "to the great seal that the bankrupt hath con-

formed, and that the certificate will be allowed and confirmed, unless cause shewn to the con-

"trary, within twenty-one days from the date of the faid advertisement."

In the mean time the bankrupt must make an affidavit to the following effect:

Bankrupt's affidavit of having obtained his creditors confent to the commissioners, their certifying shis conformity, fairly and without fraud.

In Chancery.

" In the matter of Francis Gibbons, " bankrupt."

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"Francis Gibbons of, &c. against whom a commission of bankrupt issued, on the day of
MAKETH OATH, that the certificate
bearing date the day of 1768,
under the hands and seals of Champion Branfil,

esquire, Richard Wood, and Thomas Life, gentle-

men, the major part of the commissioners in the faid commission named and authorized, whereby

they have certified to the right honourable the lord high chancellor of Great Britain, that he

besides, all the topics of inquiry set out in the above order, are especially provided for by some or other bankrupt law, or by determinations of courts of justice thereon; as for instance, cases of partnership. See sol. 1. Note (a), and stat. 10 An. c. 15. s. of joint and separate traders, sol. 149. Incase party hath been a second time bankrupt, or discharged by any insolvent debtor's act; his certificate of conformity onlydischarges his person, not his subsequent estate or essects, unless his estate be sufficient to pay 15 s. in the pound, See 5 Geo. 2. ch. 30. s. 9.

ce this

"this deponent hath in all things conformed him"felf according to the directions of an act of parliament made in the fifth year of the reign of his
late majeffy king George the fecond, intituled,
An Act to prevent the committing of frauds by
bankrupts," and the confent of all this deponent's creditors, who have figned their names or
fet their marks at the foot of the faid certificate,
that the faid commissioners may fign and feal the
fame, and that this deponent may have such allowance and benefit as are given to bankrupts by
the said act and be discharged from his debt in
pursuance thereof, was obtained fairly and without fraud."

" Sworn at the public office, &c.

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Francis Gibbons.

This affidavit being laid before the great feal, and no cause shewn within the said twenty-one days against the allowance of the certificate, the lord chancellor will allow the same, by the following subscription on the said certificate;

"Whereas the usual notice hath been given in the London Gazette, of the day of last, and none of the creditors of the above named Francis Gibbons have shewn any cause to the contrary: I do allow and confirm this certificate."

Camden, C.

### Affignees.

As the affignees may find it necessary to call the creditors together, in order to enable them to make a speedier dividend of the bankrupt's estate, the advertisement and authority in pursuance thereof shall be our next precedents.

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# The advertisement.

"The creditors who have proved their debts under a commission of bankrupt awarded and is sued against Francis Gibbons of, &c. are desired to meet the assignees of the said bankrupt's estate on the day of next, at of the clock in the at in order to assent to, or dissent from the said assignees commencing, prosecuting, or defending any suit or suits at (a) law or in equity, for recovery of any part of the said bankrupt's estate and essects; and also to their compounding, submitting to arbitration, or otherwise agreeing, any matter or thing relating thereto, and on other special affairs."

The above advertisement is by virtue of stat. 5 Geo. 2. c. 50. s. 34, 35, 38. and lord (b) Hardwicke said, that there was no colour to say, that where only sour creditors were present, at a meeting, to consider whether they should carry on a suit against a debtor to the bankrupt's estate, that they could give the assignees a general power by writing signed for that purpose, to prosecute such suits as they in their discretion shall think sit, by virtue of stat. 5 Geo. 2. c. 30. s. 38. but that the assignees must have a meeting of creditors, upon notice given for that purpose in the London Gazette, to consider of each particular suit, or each particular case for arbitration, before they can proceed in them.

Lord (c) Hardwicke said, that though the acts of parliament relating to bankrupts did only direct the assignees to advertise a meeting of creditors in relation to commencing suits, and for particular purposes, yet the assignees were very much to be com-

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<sup>(</sup>a) 2 Black. Com. 486.

<sup>(</sup>b) Aik. Rep. 91. pl. 39.

<sup>(</sup>c) Aik, Rep. 253.

mended for advertising meetings upon any other extraordinary occasion that concerned the creditors, because where they were numerous, there was no way so good to collect the whole body together.

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Lord (a) Hardwicke said, that where assignees give notice pursuant to the above starnte of 5 Geo. 2. that there would be a meeting of the creditors, in order to accept of a composition, that they had done every thing which the act of parliament prescribed on meetings for compositions of debts, and that if some of the creditors did not think proper to come, it was their own faults, and that those who were present had a right to bind the whole, if the majority in value at the meeting were of opinion to sign the composition.

## Memorandum of the meeting of creditors.

hal bus At, &c.

"BE IT REMEMBERED, that we whole names " are hereunto subscribed being the major part in " value of the creditors who have proved our debts " under the commission of bankrupt awarded and " issued against Francis Gibbons, present at the place " and time above mentioned, pursuant to an ad-" vertisement in the London Gazette, of " day of L. 101 laft " in order to affent to, or " diffent from the affignces chosen under the faid " commission, their commencing, profecuting or " defending any fuit or fuits at law or in equity, " for recovery of any part of the faid bankrupt's " estate or effects, and also to their compounding, " fubmitting to arbitration, or otherwise agreeing " any matter or thing relating thereto, and on " other special affairs. And also pursuant to the " statute in such case lately made and provided, do " consent and agree that the affignees under the

(a) Ask. Rep. 107. 2 Ask. R. P. 7. S. P.

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es fail

Affignees.

" faid commission shall [bere fet out what resolutions et the creditors come to, and what directions they give " the affignees.]"

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### Sales (a) before the commissioners.

As the estates of bankrupts are frequently fold before the commissioners, the solicitor may expect to find some precedents on that occasion, the most useful of which seem to be the following ones.

### Advertisement for the London Gazette.

"To be fold by auction, before the major part " of the commissioners named and authorized in " and by a commission of bankrupt awarded and " issued, and now in prosecution against Francis "Gibbons, of, &c. at the Guildball of the city of London, on Thursday the day of July next, " between the hours of 4 and 6 o'clock in the afternoon [Here set out a description of the premises in-" tended to be fold.] For further particulars enquire " of [the clerk to the commission."]

On the day of fale, having given each of the commissioners a particular and conditions (a) of fale, they proceed, as is usual in such cases, five minutes is allowed for bidding on each lot, and whenever a person bids, he must fign his bidding if required; when the fale is over, a memorandum thereof is figned by the commissioners.

Memorandum on fale of an estate before the commisfioners.

#### " At, &c.

" Memorandum, That we whose names are here-" unto subscribed, being the major part of the

(a) See fel 191.

<sup>(</sup>b) In these conditions, the commissioners stand for the auctioneer, and the affignees for the owners of the effate. er com-

commissioners named and authorized, in and by a commission of bankrupt awarded and issued, and now in prosecution against Francis Gibbons, of, &c. met the day and year, and at the place abovesaid, pursuant to notice in the London Gazette, for sale of the said bankrupt's real estate, consisting of [Here set out a particular description of what is intended to be sold, according to the advertisement."]

"Memorandum, The above estate was put up to

sale at the sum of when John Dalrymple of London, merchant, bid the sum of
for the said estate, and no person
(though there were several bidders) bidding more
for the same, we declare the said John Dalrymple purchaser of the said estate, at the said sum-

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Thomas Nugent, Richard Wood, Thomas Life.

If there should happen to be no bidder, the commissioners will sign the following memorandum.

"Memorandum, that the above estate was put up
to sale at the sum of and we the
faid commissioners attended from the hours of
four o'clock to fix in the afternoon, and no bidders appearing to bid for the same, the bidding
was thereupon dismissed, and the sale adjourned
to a future day."

Thomas Nugent, Richard Wood, Thomas Life.

#### Joint and Separate debts.

As the court of chancery hath (a) declared, that the commissioners have no power of admit-

(a) Atk. Rep. 68. pl. 23.

ting

ting separate creditors, to prove debts under a joint commission, without the sanction of the great seal, we will here lay before the reader the proper petition, when such application is necessary.

"In the matter of

ss Francis Gib-

bons, and Adam " Pierce, bank-

" rupts.

To the right honour-

able the lord high " chancellor of Great 66 1

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Britain.

. The humble petition of Humphrey Parslow of, &c. on behalf of himself, and the rest of the separate creditors of the faid Adam Pierce.

Sheweth,

day of " That on or about the " a joint commission of bankrupt under the great " feal of Great Britain, was awarded and iffued " against the said Francis Gibbons and Adam Pierce, " of London, merchants and copartners, and they were thereupon declared bankrupts accordingly, " and their estates and effects, as well joint as se-" parate, have been affigned to an affignee or af-" fignees, duly chosen under the said commission,

" without diffinguishing or dividing the joint ef-" fects from the respective separate estates of the

" faid bankrupts. " That the faid Francis Gibbons and Adam Pierce, " against whom the faid joint commission was " awarded and iffued, were, before the date and " fuing forth the faid commission, and still are " justly indebted to your petitioner, and others, on " the faid bankrupt's respective separate accounts, " in very large fums of money, as well for monies se lent and advanced to the faid Francis Gibbons and

" Adam Pierce, respectively, by your petitioner, as

on other accounts.

cc That

"That the said bankrupts, at the time of issuing the said commission, were respectively possessed of, or otherwise entitled unto, a very considerable personal estate in their own right, and your petitioner is advised that such separate estates are first liable to payment of the several and respective separate debts of the said bankrupts.

"That under the circumstances of this case, your petitioner, and other separate creditors of the said bankrupts, cannot be admitted to prove their several and respective separate debts under the said joint commission, so as to bind the results separate estates of the said bankrupts, for the benefit of your petitioner, and the rest of the separate creditors of the said bankrupts, without your lordship's order for that purpose.

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"Your petitioner therefore most humbly " prays, that your lordship would be " pleased to order, that your petitioner, and the rest of the separate creditors of the faid bankrupts, may be at liberty to prove their feveral and respective se-" parate debts under the faid joint com-" mission, and that it may be referred to "the major part of the commissioners " named and authorized in and by the " faid commission, to take distinct ac-" compts of the separate estates of the " faid bankrupts respectively, for the be-" nefit of their faid feveral and respec-" tive separate creditors, and that the " costs of this application, and taking " fuch accompts, be paid and borne out " of the respective separate estates of the " faid bankrupts, or that your lordship " would make fuch other order in the " premises, for the relief of your peti-" tioner,

tioner, and the rest of the separate cre-

ditors of the faid bankrupts, as to your

" lordship shall seem meet.

And your petitioner shall ever pray, &c."

The following memorandum speaks for itself, and feems proper in this place.

Memorandum of an annuitant's being admitted a creditor pursuant to order.

- and hard on " At, &c. wan I

" BE IT REMEMBERED, that, pursuant to an order of the right honourable the ford high chanet cellor of Great Britain, made the " of June 1768, Ezekiel Garrick appearing this " day before the major part of the commissioners of named and authorized in and by a commission of 66 bankrupt awarded and iffued, and now in pro-" fecution against Francis Gibbons, of, &c. made " his election to come in as a creditor for the value of the annuity in the faid order mentioned, " upon the separate estate of the said Francis Gibbons; and the faid commissioners proceeded in " the presence of the faid Ezekiel Garrick and his 66 folicitor, and the affignees and feveral of the " creditors, to make an estimate of the value of " the faid annuity, and upon hearing what was " alledged on both fides, and upon confideration " of the matter, the faid commissioners valued " the faid annuity at four years purchase, amounting to the fum of 100 l. whereupon the faid . Ezekiel Garrick was admitted a creditor for the faid fum of 100 l. pursuant to the said order."

> Thomas Nugent. Richard Wood, Thomas Life.

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In fol. 300. We observed on a precedent of " An " act of bankruptcy, as concerted by the bank-" rupt himfelf;" the fame writer gives us occasion to make another observation in this place. He fays, " that an order of dividend at the third fitting " may be looked on as an unprecedented thing, " and as never done; because the act says, after " four months, and within twelve months, a dividend " Shall be made, &c. but it does not fay it shall not be " made before;" and then goes on with a strange fort of reasoning to shew that a dividend may and ought to be made at the third fitting. Lord (a) Hardwicke faid, " that an attempt to make the " court judges in what manner the effate and ef-" feets of a bankrupt should be distributed before " the expiration of four months from the date of " the commission, was absolutely an attempt to change " the method chalked out by the ast, and ought to meet " with the utmost discouragement; for that time (faid " lord keeper North) is given to all creditors to " come in, and if they might be hindered from " coming in, before the four months, it might be " made a trick to cozen (b) them."

We presuming the affignees not willing to make a dividend even after the expiration of twelve months, from the issuing of the commission, will here set

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# Notice (c) from commissioners to assignees to make a dividend.

"You are hereby required to attend us, whose names are hereunto subscribed, or the major part

<sup>(</sup>a) Atk. Rep. 107.

<sup>(</sup>b) 2 Chan. Caf. 191. (c) See Atk. Rep. 91. pl. 39.

" of the commissioners named and authorized, in " and by a commission of bankrupt awarded and " issued, and now in profecution against Francis " Gibbons, of, &c. on the day of at the Guildhall of the city of London, to " fhew cause why notice has not been given by you for making a dividend of the estate and effects of " the faid bankrupt, according to the act of par-" liament in that case made and provided, which if " you fail of doing, a meeting will be forthwith apof pointed by us, whose names are hereunto sub-" (cribed, or the major part of the faid commif-" fioners in and by the above commission named " and authorized, for you to produce your receipts " and payments touching the same, and to make " a dividend of fuch part of the faid estate and " effects, as shall appear to be remaining in your " hands. Dated this day of " 1769. In a nonvocice al par las

" To John Partridge and Thomas Nugent,
" Charles Dennis, affig- John Fenshawe,
" nees of the estate and Thomas Life.
" effects of Francis Gib" bons, bankrupt."

This notice the affignees are to give by the following advertisement in the Gazette.

#### The advertisement.

"The commissioners named and authorized in and by a commission of bankrupt, awarded and issued, and now in prosecution against Francis Gibbons, of, &c. intend to meet on the (a)

(a) Three weeks notice at least must be given.

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"day of next, at o'clock in the noon, at Guildhall, London, in order to make a dividend of the effate and effects of the faid bankrupt, when and where the creditors who have not already proved their debts under the faid commission, are hereby required to come prepared to prove the same or they will be exculuded the benefit of the said dividend."

### Order of dividend by admission.

#### " At, &c.

" BE IT REMEMBERED, that we whose names " are hereunto subscribed, being the major part " of the commissioners named and authorized, in " and by a commission of bankrupt, awarded and " iffued, and now in profecution, against Francis " Gibbons, of, &c. having met together the day and " year, and at the place above mentioned, in order " to make a dividend of the estate and effects of the " faid bankrupt, pursuant to notice given in the " London Gazette for that purpose; and it being ad-" mitted by John Partridge and Charles Dennis, af-" fignees of the estate and effects of the said bank-" rupt, that they now have sufficient money in " their hands to pay all the creditors of the fail " bankrupt, who have already proved or claimed. " debts under the faid commission, 14s. in the " pound for every pound fo proved or claimed. " We do therefore, pursuant to the said admission, " and at the defire of the creditors, order and di-" rect that the faid affignees do forthwith pay and " divide unto and amongst all and every the " creditors of the faid bankrupt, who have proved " their debts and the claimants when they shall

" have substantiated their claims by proof under the

" faid commission, 14 s. in the pound in propor."
tion to their several and respective debts."

Champion Branfil, Richard Wood, Thomas Life. to pay

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If a creditor will make an affidavit that he hath not read the Gazette, he will be admitted (a) upon the common equity of the court of chancery, so as not to disturb (b) the former dividend, and by that means must in the first place, be brought up equal to the creditors under the first dividend, before the commissioners can proceed to make a second.

The meaning of not disturbing a dividend already made, is this:

Suppose a bankrupt's effects amount in the whole to 600 L clear of all charges, and he owes 1500 L and goo ! only are proved; the commissioners knowing of no other debts, order a dividend of ten shillings in the pound, this dividend will amount to 450 l. fo that there will be remaining in the affignees hands, after payment thereof, only 150 l. and if afterwards other creditors come in to the amount in value of 600 l. fuch creditors will loose 150 1. because there will be but five shillings in the pound remaining to pay them, instead of ten shillings, and these creditors have no right to disturb the former dividend, or to oblige the other creditors to refund any part of the ten shillings in the pound, received by them on their feveral and respective debts; but if on a second dividend it appears that the affignees have fufficient in their hands

<sup>(</sup>a) Ask. Rep. 209.
(b) See fol. 486.

to pay those creditors who have proved their debts fince the first dividend ten shillings in the pound; in fuch case they are to receive an equal dividend with those creditors who first proved their debts, before any fecond or further dividend is made to the creditors in general.

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To the right honour-" Francis Gibbons, " able the lord high

chancellor of Great

. Britain.

The humble petition of Robert Martin, of, &c.

" Sheweth,

"That the faid Francis Gibbons on or about the day of 1768, became bankrupt, and a commission of bankrupt dated the faid day of was awarded against him, and he was declared bankrupt accordingly, and John Partridge, of, &c. and Charles Dennis, of &c. were duly chosen af-

fignees of his estate and effects.

"That there was at the time of the date and fuing forth of the faid commission, due to your petitioner from the faid bankrupt the full and just sum of 200 %. of lawful money of Great Britain for principal and interest by virtue of a bond or obligation, bearing date the 1767, under the hand and feal of the faid bankrupt, for which faid fum of 200 l. your petitioner hath not, nor hath any other person or persons for his use, or for the use of any other person or persons, to the knowledge or belief of your petitioner, had or received any fe" curity or satisfaction whatsoever, save and ex.

"That your petitioner having been of late very much abroad, hath had no opportunity of read.

ing the Gazette, as by affidavit (a) annexed ap.

pears; whereby your petitioner hath negleded to prove his faid debt under the faid commif.

" fion.

"That a dividend hath been made of the faid bankrupt's estate and esfects, of fourteen shillings

" in the pound.

" That on the day of

" last, there was a meeting of the commissioners,

"in order to make a second dividend of the said bankrupt's estate, at which meeting your pen-

"tioner was admitted to prove his faid debt of

200 l. but there being feveral claims undeter-

mined, and the affignees not being prepared to pass their accompts, the making a second divi-

" dend of the faid bankrupt's effate and effects

" was adjourned to the day of

e next.

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"That your petitioner hath by his folicitor ap-

" his faid debt equal with the other creditor

(who have received their dividend of fourter

fhillings in the pound) out of the money that the same of the first same of the first same of the same

" they infift that they cannot pay your petitions

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<sup>(</sup>a) This affidavit must be in the common form, and the credit must swear that " he hath not read the Gazette, in which any add " tisement was inserted, to the creditor's belief, relative to the common of bankrupt awarded against the said Francis Gibbon," to the like effect.

" after that rate in the pound, on your petitioner's debt.

"Your petitioner, therefore, most humbly prays your lordship that the asfignees of the said bankrupt's estate
and effects, may pay your petitioner
his proportionable dividend of the
faid estate and effects, in respect of
his debt so proved as aforesald, equal
with the creditors already paid.

" And your petitioner shall ever pray, &c."

## Order for a further dividend.

### " At, &c.

" Be it remembered, that we whose names are " hereunto subscribed, being the major part of the " commissioners named and authorized, in and by " a commission of bankrupt, awarded and issued, " and now in profecution against Francis Gibbons, " of, &c. having met together the day and year, " and at the place above mentioned, in order to " make a further dividend of the estate and effects " of the faid bankrupt, pursuant to notice given " in the London Gazette for that purpose; and it " appearing to us, that by an order of dividend " made the day of " laft, the affignees under the faid commiffion ad-" mitted, that they then had fufficient money in " their hands, to pay all the creditors of the faid " bankrupt, who had proved or claimed debts un-" der the said commission, the sum of 14s. in the " pound, for every pound fo proved or claimed; " the faid commissioners did therefore, pursuant

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Gibbons,"

to the faid admission, and at the defire of the creditors, order and direct that the affignees to should pay and divide unto and amongst all and ex every the creditors of the faid bankrupt, who had proved their debts and unto the claimants, when they should have proved their claims under the said commission, the sum of 14s. in the pound, in proportion to their feveral and respective debts; and it being admitted by the faid af. se fignees, that they have now sufficient money in their hands, to pay (a) all the creditors not included es in the former dividend, and who have at this fitting proved their debts under the faid commission, the like dividend of fourteen Stillings in the pound, upon their se several and respective debts and also sufficient to pay all the creditors of the faid bankrupt, who have already proved or claimed debts under the faid commission, the further sum of 3 s. in the pound, over and above the fum of 14 s. in the pound, " already divided under the fald commission, for every pound fo proved or claimed. We do there. " fore, pursuant to the faid admission, and at the defire of the creditors, order and direct that the faid affignees do forthwith pay and divide, unto and amongst (a) all the creditors not included in the se former dividend, the fum of fourteen shillings in the pound, and unto and among ft (a) all and every the creditors of the faid bankrupt, who have proved their debts, and unto the claimants, when they shall have proved their claims under the faid

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<sup>(</sup>a) The above marked in italits is to be inferted only when creditors prove debts for whose dividends no reservation hath been made in former calculations; and when the affignees have sufficient in their hands to pay such subsequent creditors former dividends without disturbing the dividend already made.

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commission, 3 s. in the pound, in proportion to their several and respective debts.

Thomas Nugent, Champion Branfil. Thomas Life.

Order for a (a) further dividend, not by admission.

At, &c.

in the pour " BE IT REMEMBERED, that we whole names " are hereunto subscribed, being the major part of " the commissioners named and authorized, in and " by a commission of bankrupt, awarded and if-" fued, and now in profecution against Francis Gib-" bons, of, &c. having met together the day and " year, and at the place above mentioned, in or-" der to make a further dividend of the estate and " effects of the faid bankrupt, pursuant to notice " in the London Gazette for that purpole given. " And it appearing to us, that by an order of divi-" dend, made the day of " last (or 1768) the affignees under the faid com-" mission admitted, that they then had sufficient " money in their hands, to pay all the creditors of " the faid bankrupt, who had proved or claimed " debts under the faid commission, the sum of 14 s. " in the pound, for every pound fo proved or " claimed; the faid commissioners did therefore " pursuant to the faid admission and at the defire " of the creditors order and direct, that the affig-" nees should pay and divide unto and amongst all " and every the creditors of the faid bankrupt who " had proved their debts, and unto the claimants

<sup>(</sup>a) This will serve for a final dividend, mutatis mutandis.

when they double have proved their claims under the faid commission, the fum of 140 in the to" pound, in proportion to their feveral and respec. " tive debts ; and it also appearing to us that by If an order of dividend made and to esencific entil (88) the not the of fames Browned out to " under the faid commission admitted, that they off then had fufficient money in their hands to pay all ohe creditors of the laid bankrupt, who had o"proved or claimed debis under the faid commif. biff liam the further fum of 3s. in the pound, over lo sand above the fumof 14 slih the pound already - the divided under the faid commission for every pound "s' rio proved or claimed; the faid dommissioners did biff therefore purfuant to the faid last admission, and befrag the define of the creditors, order and direct. best that the affiguees should pay and divide unto and soff amongst all and every themereditors tofrethe faid and barikfupty who had proved their debts; and in-16 to the claimants, when they should have proved " Strhein claims under the faid commission, the furthen fum of a satint the pound, in proportion to ad their feveral and respective debts in and it also further appearing to us, by the accompand John S' Bartridges one of the faid affignees this day exbis hibited to uso upan outhbis Gbarles Dennis, the bist other affiguer, not having lost received any part aveti off whe daid bankoups's selfatel and effects, as allo antibapplars tous wupon the inath of the Said Charles Ilist Denning sthat the form total of the faid bankrupi's selff effaredince igotoin and received by them, doin - Me amount to the fum of to mul red which being added to the fun of far son and grown baske to-And it also ap-" gether the fum of

a) If no debts remain to be proved at this fitting, then what is not many the what is the many that the dividend and further dividend his bis? The dividend and further dividend his bis?

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" pearing to us by the accompt of the faid John " Partridge and also by a certificate of Thimas Cuddong elgs one of the maftets of the high court of "Chantery, bearing date the 11 bas day of avia of his having fettled and raxed a bill 6 17 "of fees and difburfements of James Browne, clerk sti to the fuid commission, at the sum of 15 bits of shad and by another certificate of H. M. efg. another of the mafters of the faid court of Chan-Micros, bearing date the de dinie or bevoday of bas bound and in the pound, own staxed another bill of fees and difburfements of "the faid James Brown, under the the faid combe million, including the cofts of feveral actions at bis lawifite the fumuofort or trauling othat the faid 161 John Partridge hath paid, laid out and expended best the same of one year blood which being deducted from the faid fum of years but he freduces the is fame to the furt of your bad only which faid fum now remains in the hands of the faid foon Partridge to be divided. And (a) it appearing to us that the debts proved under the faid commission, indiscluding the debts that have been this day proved to the amount of os and you are to make together the fum -ib bas rabto ob sw wolf faid affiguees this ow " reof that the faid dividends of (b) bestidid and bisq sd flad boung soft masgnillish received any part ols to such of the faid banksupt's creditors who have withis day proved their debts which will amount invested bish shand after payment thereof there will remain in the hands of the faid John Partridge -ib shount to the fum of fo mul redwindship -0149 wided among the creditors of the Said bankrupts And And it alto apgether the lum of

(a) If no debts remain to be proved at this fitting, then what it is it in it is it

(b) Viz. The dividend and further dividend by admission.

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we do order and direct, than out of the monies " fo remaining in the hands of the faid John Partridge as aforesaid, a further dividend of " in the pound be paid to all the bankrupt's credi-" tors who have already proved their debts and " fought relief under the faid commission, in proporet tion to their several debts, which said dividend in the pound amounts to the " fum of as we compute the fame. and after the payment thereof, there will remain in the hands of the faid John Partridge the fum ec of and no more, subject to our further order, [or which he is to retain towards answering future charges, and making a of further dividend.]"

Thomas Nugent,
Champion Branfil,
Thomas Life.

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## Memorandum of adjourning dividend.

# At, &c. of At, &c.

"BE IT REMEMBERED, that we whose names are hereunto subscribed, being the major part of the commissioners named and authorized, and by a commission of bankrupt, awarded and issued, and now in prosecution against Francis Gibbons and Adam Pierce, of, &c. having met together the day and year, and at the place above mentioned, in order to make a dividend of the joint estates and effects of the said bankrupts, and also of their separate estates and effects, pursuant to notice in the London Gazette for that purpose given; but John Partridge, one of the assignees under the said commission being absent, we could not proceed to make such dividend, and therefore adjourn making

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" making the fame unto the next, at four o'clock in the after-" noon, at the same place.

Thomas Nugent, Richard Wood, Thomas Life.

Dividend under a joint commission, whereon an order had been obtained, for taking an account of and dividing the bankrupt's Separate estate.

the laid commission, in prob-

debis, which faid divis

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# At, &c.

Whereas we whose names are hereunto sub-" fcribed, being the major part of the commif-" fioners named and authorized in and by a com-" miffion of bankrupt, awarded and iffued, and " now in profecution against Francis Gibbons and " Adam Pierce, of, &c, did meet the day and year, " and at the place abovefaid, purfuant to notice in " the London Gazette, in order to make a dividend " of the joint and separate estates and effects of the " faid bankrupts; and we have, in obedience to " an order of the right honourable the lord high " chancellor of Great Britain, taken an accompt " of the joint and separate estates and effects of " the faid bankrupts, and it appears to us that the " total of the joint debts proved and claimed un-" der the faid commission, amounts to the fum of and that the total of the fepa-" rate debts of the faid Adam Pierce so proved and " claimed under the faid commission, amounts to " the fum of and that the total of " the separate debts of the said Adam Pierce, so " proved and claimed under the faid commission, " by virtue of the faid order, amounts to the fum . es of and that the clear fum in Y. 3

the hands of John Partridge and Charles Demis " the affiguees of the faid bankrupe's joint effates main in the 16 mul she to the fum of ant ni miam " and of the separate estate of the said Francis Gib. bons to the fum of and of the " separate estate of the faid Adam Pierce, to the sum We do therefore order, that " the fum of mod? part of the faid fum of be diffributed and paid to the " respective joint creditors of the faid Bankrupts, er who have already duly proved their debts under the fald commission, in manner following, viz. at the rate of 6 s. 9d. in the pound to Miles Green, in respect of a debt of garing miproved by him this day, being the amount of the former and prefent dividend; and in respect of all " his other debts, after the rate of T's, and 3d. in the pound; fo that the famof erantrago bafter payment of the faid creditors, will remain in the hands of the faid affighees, of the faid joint estate and effects. And we do further order that the en guidanot be diffributed and paid to the echilo. respective separate creditors of the faid Francis Gibbons, who have duly proved their debts under the faid commission, in pursuance of the faid pound; to that the fum of ward, bedred after order, after the rate of eleven fillings in the payment of the faid dividend, will remain in the hands of the faid affignees, of the separate estate of the faid Prancis Gibbins, And we de further order, that the fum of a olla on usual part of the bis boudentibud doth contain a fund amil bist as paid to the respective feparate creditors of the then debts under the Taid committion, in pur-Williance of the fald order, after the rate of three ce hillings

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"fhillings in the pound; so that the sum of after payment of the said dividend, will re- main in the hands of the said assigners, of the separate estate of the said Adam Pierce."

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We do therefore ordeland

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Thomas Nugent, Richard Wood, Thomas Life.

If the affiguees cannot perforally attend the commissioners on the day by them appointed for making a dividend, they must make an affidavit to the following effect, viz.

Hohn Partridge, of, &c. and Charles Dennis, of, " &c, affigness under a joint committion of bank-"rupt awarded and iffued, and now in profecution " against Francis Gibbons and Adam Pierce, of, &c. " and copartners, make oath, And first this de-" ponent John Partridge for himself faith, that the "two theets of paper hereunto annexed, and res spectively signed by him this deponent, do con-" tain a full and true accompt of all his this depo-" nent's receipts and payments, touching the efface " and effects, of the faid bankrupts, as well joint " as separate, under the said commission; and this " deponent further faith, that the feveral funs therein charged, to have been allowed, paid, and expended, have been really and bong fide allowed, paid, and expended, in manner, and for the pur. "poles therein mentioned. And this deponent "Gharles Dennis for himself faith, that the paper writing hereunto also annexed and figned by him this deponent, doth contain a full and true acof compt of all his this deponent's receipts and payof ments, touching the chare and effects of the - "daid bankrupts, as well joint as lenarate, under "the laid commission. And this deponent further es Billings

"faith, that the feveral fums therein charged, to " have been allowed, paid, and expended, have

been really and bona fide allowed, paid, and ex-" pended in manner and for the purposes therein

" mentioned."

"Sworn, &cob and no band John Partridge.

The dividend being declared by the commiffioners, it will fave the affignees a great deal of trouble in the payment of it, if the folicitor computes the dividends, which (a) computation may be intituled.

A lift of the debts proved under the comwood " mission of bankrupt against Francis Gib.

" bons, of, &c. with the amount of each

" creditor's dividend, on the fum of

being the fum ordered to be divided

amongst the said creditors, after the rate of many fallings in the

Bleary Combes

thillings in whe pound Names of the creditors. Debts proved. Dividends.

If any bond, note, or other fecurity was not exhibited by the creditor, at the time of his proving his debt, the affignees ought not to pay such creditor his dividend till fuch bond, &c. be produced.

It is usual for the affignces to give notice of the time and place they intend to pay the dividend; if auth fect,

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<sup>(</sup>a) The expence of computing the dividends by the folicitor, and preparing and copying the above lift, will be allowed by the master in the affignees accompts.

it be paid by the affignees, the folicitor figns an authority for that purpole, to the following efe Dave been allowed, paid, and expended, base

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Gentlemen and band har allow che when the " Please to pay Mary Combes, the sum being her dividend of " shillings in the pound on her debt of " proved under the commission of bankrupt against " Francis Gibbons, of, &c.

nor sar yd bersied Yours, &c. ovil on? To Meffrs. Partridge and James Browne. Dennis, said bankrupt's affignees. 14 July, 1769.

The affignees, upon receiving this authority, pay the creditor, and take a receipt in a book to the following purport, viz.

reaster a dividence on the lam of " Received this day of July, 1769, " of Messis. Partridge and Dennis, assignees of the " estate and effects of Francis Gibbons, of, &c. " bankrupt, the fum of being a divi-" dend of shillings in the pound, " on my debt of proved under the " faid commission.

Mary Combes .:

## Inrelment.

Whereas commissions of bankrupt, and the depolitions taken before the commissioners, and the proceedings upon commissions, are (a) most comta winout place they intend to pay the dividend

(a) Not withstanding this express declaration of the legislature, it made a doubt of, even at this day, under whose control, and sub-Y 5

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monly kept by the clerks or ferretaries to the commit forers, and by reason of the death of the clerks. Scott are many times toft and miffald, by means whereof purchafers of premiles? under commillions of bankrupe, may be disabled to make out their right and title to the fame, and there being no certain place where the creditors of a bankrupt, or any person claiming any estate or interest in any premifes by or under a commission of bankrupt, can have recourfe to the commission and proceed. ings thereopon's and the (a) commission, depositions, and proceedings, in case they can be produced, are not at prefent of record; nor can be given in evidence; which may be of very evil confequence to purchafers, or perform claiming as aforefaid of Therefore upon netition of any person to the great feal, praying that the commission, and the depositions taken thereon, or any part of them, and certificates (b) milion has iffeed, and find what depositions have

ject to whole order, folicitors, and the proceedings in bankrupt cales spect to whole order, folicitors, and the proceedings in bankrupt case and. Receives to this statute, the court of King's Bench declard, that they could not order a witness, who had been examined by the commissioners of bankrupt, a copy of his deposition, because it was limit of a public hatties, but taken by the commissioners to define them to give a creditor a certificate of his having proved a debt, in other for him to demand the fight of a bankrupt prisoners; how to certify to a judged of judice of peace, that the party is found bankrupt, a order to get a warrant for his apprehension a tow to certify the number of certify the pure order to get a warrant for his apprehension; how to certify the nunber and value of creditors, and that the bankrupt has conformed in order that he may obtain his discharge; if the proceedings are not under the immediate controll and direction of the commissioners; and indeed there is scarcely an authority or power given the commissioners by the bankrupt flatutes, that can be duly executed without the proceedings. It feems not improper to observe in this place that one sannot be both clerk and commissioner to the same commission. School, Cas. 46. that a clerk may be removed for irregularity, School, Cas. 45, and that he may be discharged by the affigness. Vin Abr. 117, pl. 2.

(a) We always understood that every commission under the broad seal was evidence of itself. See Tri. at Nis Prius, 38.

(b) Certificates entered of record, or true copies duly figured and at

tested, shall be given in evidence in the courts of record, and be Without if

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To the and any creditor or other person may know where to fearch and fee whether fuch commiffion has iffued, and find what depolitions have been taken by virtue thereof, and what proceedings have been thereupon, and whether the bankrupt hath made affidavit or affirmation of having obtained his certificate (a) fairly, and whether fuch certificateris entered of record, and all other matters or things to be entered of record in pursuance of this act, the great feal shall appoint a certain proper place near the inns of court, where all and every the matters aforefaid shall be entered of record, where all persons shall be at liberty to fearch is fearerly an authority or power given the commissioner

without any further proof deemed, adjudged, and taken, to be a full ad effectual bar and discharge of and equinit any action or but, which hall be commenced or brought by any cheditor of the bankrupt, for any debt of demand, contracted, due, or demandable, before the illing of the committion, until any creditor of the bankrupt shall prove that the certificate was fraudulently, obtained in which case costs that be allowed to either party, as in other common cases. State 5 co. 2. c. 20 c. 11 Sec. 12 c. 20 c

and fee if the same are duly entered of record, and the great feal shall by writing under hand appoint a proper person, who shall by himself or suffi. cient deputy, to be approved by the great feal by writing under hand, enter of record the commiffion, depositions, proceedings and certificates, and other matters and things, and have the custody of the entries thereof, and also appoint such see and reward, to be paid to fuch person for his labour and pains therein, as the great feal hall think reafonable, not exceeding what is usually paid in the like cases; and that the person to be appointed and his deputy shall continue to enter of record all and every the matters and things aforefaid, and to have the cuftody of the same so long as he shall behave himself well, in entering the same of record, and keeping fuch entries, and shall not be removed but by order in writing under the hand of the great feal, on good and sufficient cause therein specified, and in case such person shall die or be as aforesaid removed, the great feal shall in writing under hand, appoint another person to enter the same of record, who shall have the custody of the entries thereof, and shall have and receive the like fee and reward for his labour and pains (b) to a simplete the fille therent, your perenisrant

(b) Stat, 5 Geo. 2. c. 30. f. 41. He and to street bei colored bei

Your peritioners therefore with a work of the work of the work of the proceedings of committee of the proceedings of committee in the measurement of the work of t

Petition

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Petition for the involment of proceedings, under com-

To the right honourable the lord:

" The humble petition of John Partridge and " Charles Dennis, assignees of the estate and es" sects of Francis Gibbons, banksupt,

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"That on or about the day of May
"1769, a commission of bankrupt was awarded
and issued against Francis Gibbons of, &c. and
your petitioners were duly chosen assignees of his
estate and effects, and the major part of the commissioners in the said commission named and authorized, have executed an assignment of the
personal estate, and also a bargain and sale of
the real estate of the said bankrupt, to your petitioners accordingly.

"That the faid bankrupt was seized of or inti"tled unto him and his heirs, of and in the equity

" of redemption, of a freehold estate in

which has been fold, and in order to complete the sale thereof, your petitioners are advised that it is proper and necessary, that several parts of the proceedings under the said commission, should be inrolled.

"Your petitioners therefore most humbly pray your lordship, that the style
and title of the proceedings of the
commissioners under the said commission, the memorandum of the said
commissioners taking the usual oath,

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proved their companies of the pertitioning crewind the companies of the remains of the companies of the conditions of

Petition for the inrelment of the bankrupt's certifi-

" high chancellor of Great Britain.

As the head of the petition of Francis Gibbons, bankrupt,

one described of any programment of the described of the service o

the treditors of your petitioner de ho proved their debust under the faid commission, have figured their names at the foot of the faid certificate, their names at the foot of the faid certificate, their have fuch allowance and benefit as are given to have fuch allowance and benefit as are given to bankrupts, and the fame certificate hath been almost and confirmed by your lotelship.

That your petitioner is delitous, that his faid & certificate so confirmed as aforefaid, may be en-

of the truft thereofbroom to brest !!

high chancellor of Great Britain.

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ong has abeen bly prays your lordhip, that his faid

certificate, together with your pe-

" the fame fairly and without fraud,

ditres e record, purluant to the act of parliament, in that case made and provided,

orol set sidamoth And your petitioner, &c."

As the legislature has declared the profession ineapable of practice; in case they violate any of the stamp laws, our purpose was here to have made the practiser acquainted with the duties, to which proceedings under commissions of bankrupt, are liable; but upon considering the subject, we found it not in our power to give the reader that satisfaction; we shall therefore, instead thereof, lay before him our reasons for not being able to give him, such a necessary information.

The laws relating to the stamp duties, seem to particularize the various matters subject to and exempt therefrom; now proceedings, depositions, examinations, or memorandums under commissions of bankrupt, are neither expressy charged or discharged by those laws; which we apprehend, for

the fake of certainty and fecurity, especially under laws of such general concernment, and so very penal in many instances, ought to have been: but practice totally exempts all the above proceedings.

By these laws all deeds whatever are charged with a fingle half crown stamp; now usage exempts a warrant of commitment by commissioners of bankrupts; and charges their warrant of seizure with only a treble six-penny stamp; as we conceive that warrants of commitment, and seizure, are either deeds, or not deeds, they therefore ought to be either not stamped at all, or stamped with a single half-crown.

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Thus the certificate of the commissioners of contempts; of the party being found bankrupt; or of a creditor having proved his debt under a commission; are all by custom totally exempted, whereas their certificate, that a bankrupt has conformed, is as constantly engrossed on a treble fix-penny skin of parchment.

## Renewed Commissions.

If it shall be necessary to (a) renew a commiffion of bankrupt, but half fees shall be paid for the fame.

chu kentherve, and Champion terran

In order to obtain such commission, application must be made to the great seal, by petition to the sollowing effect.

(a) Stat. 5 Geo. 2, c. 30, fect. 45.

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comped paper, and lodged it the Coretary of bank of solice by the folicitor, and is not annexed

egs had been thereon had en

or committees of the committees.

" To the right honourable Charles lord Camden, baron of Camden Place, an the county of Kent, lord high chan-" cellor of Great Britain. A 100 12 100

46 The humble petition of Charles Jones, of, &c. 2 " creditor of Francis Gibbons, bankrupt.

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"That upon application of your petitioner, a " commission of bankrupt dated the day in the year of the reign " of his late majesty king George the fecond was " awarded against Francis Gibbons, of, &c. directed " unto Thomas Nugent, John Fenshawe, esquires, and " to Champion Branfil, Richard Wood, and Thomas " Life, gentlemen, whereon the faid Francis Gib-" bons was declared bankrupt, and several proceed-" ings had been thereon had.

"That by reason of the death of the said The-" mas Nugent, John Fenshawe, and Champion Bran" fil, the faid commission cannot be further pro-

" ceeded upon without being renewed.

"Your petitioner therefore humbly of prays your lordship, that the said commission may be renewed.

"And your petitioner shall ever pray, &c."

This petition is ingroffed on a treble fix-penny flamped paper, and lodged at the secretary of bankrupt's office by the folicitor, and is not annexed (as the original petition) to the commission.

Renewed

whereof you the faid (a). Renewed Commission, on death of commissioners. curion and accomplishment of

"George the third, by the grace of God of Great Britain, Prance, and Freland, King, defender of the faith, &c. To our trufty and well beloved ourlest at his minfler, the

greeting, [here recite the original commission, in fol. 309, &c. to " diligence and effect;" then add. Now for amuch as Charles Jones, of, &c. by his humble petition, exhibited to our lord high chancellor of Great Britain, for the reasons therein contained, prayed that the faid commission · might be renewed, whereunto we graciously inclining, do by thele prefents name, affign, appoint, constitute, and ordain you our special commissioners, HEREBY giving full power and authority unto you, four or three of you, whereof you the faid (a)

and to be one, to proceed according to the flatutes, and all other flatutes in force concerning bankrupts; not only conce cerning the faid bankrupt, his body, lands, tenements, freehold and customary goods, debts, " and other things whatfoever; but also concern-" ing all other persons, who by concealment, claim, or otherwife, do or shall offend touching the premiles, or any part thereof, contrary to the true To Do and execute all and every thing and things " whatfoever, as well for and towards fatisfaction and payment of the faid creditors, as towards and for all other intents and purpofes, according to the ordinance and provision of the same sta-

tutes, WILLING and commanding you, four or

pl, 208.

(a) See fol. 311. in Notes, siit

See Pref. Difc. iv. Note (a). se three a three 66

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The (b) the were n miffion was w old co (e) Fet might grante all oth

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might b be made (e)14 (f) (g) S

a three of you, whereof you the faid (a) and and to be one to pro-" ceed to the execution and accomplishment of " this our commission, according to the true intent " and meaning of the lame flutures, with all dili-" gence and effect, as our special soult is in you Witness ourself at Westminster, the " reposed. 64 day of in the " our reign diligence and effect :

J. Yorke.

### and snoken and Superfedeas, was to to to learned laid committee bayerd than tinon at

his hamble petition, exhibited to our lord him

as Chartes forces of,

The petitioning creditor may agree to superlede (b) the commission, but the other creditors who were not petitioning ones, may (c) renew the commission, and revoke the Supersedeas; especially if it was within four (d) months after the granting the old commission; for the old commission (faid lord (e) feffries) cannot prejudice any other creditor who might come in; for the commission is expressly granted on behalf of the petitioning creditor, and all other creditors, and cannot be otherwise, for the petitioning creditor is no more concerned than others who shall come in

A new commission (f) superfedes the old one; which may be done by the great seal, by reason of the (g) milbehaviour of the commissioners; for that

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<sup>(</sup>d) For that sime is given to all ereditors to come in, and if they might be hindered from coming in before the four months, it might be made a trick to cozen them. 2 Chanc. Cat. 191. suices, willing and commandency outher

<sup>(</sup>f) Freem. 270. pl. 298.

<sup>(</sup>g) See Pref. Difc. iv. Note (a). Ratoli ni ang lot and (a) 35101 30

the party was not a trader; that no (a) debt was due to the petitioning creditor; that the party had not committed an act of bankruptcy; for that the commission was not opened until (b) fix or three (c) months after it iffued; for that the bankrupt hath fatisfied all his creditors, and they have given him a general (d) release; or it may be superseded for (e) other reasons.

We will now, supposing a sufficient ground for fuperfeding the commission, give the solicitor all the

necessary precedents for that purpose.

## Petition to Supersede Commission.

In the matter of " Francis Gibbons,

66 bankrupt.

" To the right honour-

able the lord high chancellor of Great chancellor of Great

26 319

The humble petition of the faid Francis Gibbons, the bankrupt.

" Sheweth,

"That a commission of bankrupt, under the great seal of Great Britain, bearing date at West-

" minster, the day of June, 1768, was " awarded and iffued against your petitioner, upon

" the petition of Charles Jones of, &c. which com-

" mission was directed to certain commissioners. "therein specially named and authorized, the ma-

(a) See fol. 62, &commen in the mos and beninga drad

(b) 2 Wil. Rep. 545. wandle ed an storical sout all the (c) Sel. Caf. in Chanc. 46.

(d) Ath. Rep. 145. pl. 84. A conference reasonable 1997

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(b) I followin " who! " credi

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> July, Filin tifica and t vit

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(a) If of your Dennis, fore the " (6) 7 only cre faid con hereunt fenting purpole

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pears.

<sup>(</sup>e) As if bankrupt pays the petitioning creditor his whole demand, in preference to his other creditors. Stat. 5 Geo. 2. c. 30. f. 24.

i jor part of whom found and declared your peti-TUCKER (New PHILLE)

" tioner bankrupt (a).

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(b) Instead of this allegation, you may insert the following one, viz. "That the several persons " whose names are hereunto subscribed, are all the " creditors of your petitioner, who have proved or " claimed any debt under the faid commissioner, " by the certificate of the faid commissioners, " hereunto annexed, appears, and as all the " faid creditors of your petitioner are confenting " that the faid commission should be superseded, " and for that purpose have fignified their consents in writing to the prayer of this petition, at the foot hereof, as by affidavit also annexed ap-" pears."

"Your petitioner therefore most " humbly prays your lordship

, " would be pleased to order July, 1768. Filing the certificate of the commissioners, and the affida-

Brown, be it as

"that the faid commission of " bankrupt awarded and iffued " against your petitioner as " aforesaid, be immediately su-

vit of James " perfeded, and that a writ of " supersedeas, do forthwith if-

(a) If the fact be fo, you add here, " and executed an affignment of your petitioner's estate and effects to John Partridge and Charles Dennis, and your petitioner hath finished his last examination before the faid commissioners.

" (b) That the faid Charles Jones, the petitioning creditor, is the only creditor of your petitioner, who hath proved a debt under the faid commission, as by the certificate of the said commissioners, hereunto annexed appears, and as the said Charles Jones, is conlenting that the faid commission should be superfeded, and for that purpose hath fignified his consent in writing to the prayer of this petition, at the foot hereof, as by affidavit also annexed, ap-

"Your petitioner therefore, &c. [as before.] not slandward total gaine

State | State | 60 acr 2, 6, 90, 6, 24

er prayed.

st prayed, ant no a dufue for that purpole, at your sil "Camden, C. gait peritioner's (a) expence. rever that the tand the fard the fard the fard What Gibbons of the faid france Cibbons did, before the date and fuing forth of the " (b) We whose names are hereunder written,

do hereby most humbly testify and declare our consents to the prayer of this petition, in case your lordship shall be pleased to grant the same. Witnels our hands this amoistimmod day of July, dot lo dinip, that Charles Tones,

Leigh, John Merith, James Welchy Charles Dennes Certificate (c) of the commissioners to the great feal of the proceedings had under the commission, to Superfile Goodcer, Charles Church, John Smal adt te Saimball, are the only creditors of the faid Man

In the matter of owner To the right honourable Francis Gibbons, is and swithe ford high chanceller

bankrupt brol moy or y's of Great Britain.

" did meet purfuant to notice in the London Ga " We whose names are hereunto subscribed, beding the major part of the commissioners named

of and authorized in and by a commission of bank. " rupt, bearing date at Westminster, the sal ad

15 day of June, 1768 solawarded and iffued against

the Francis Gibbons of Sent directed Towns Thomas

d' Nugent, John Rengharde, efquires, and Thomas Life " gentleman, together with Champion Branfil, el-

quite, and Richard Wood, gendeman, do him

bly certify to your lording. That we the major were duly cholen affignees of the efface and effects of

(a) If the application to superfede the commission be from the mile behaviour of the petitioning creditor, you may pray that the fitter feders be at his expense, at it is north composition and the state of the state Sedeas be at his expence, adt to

(6) If there happens to be only one creditor you fay, a It

(c) To be engressed as a treble fix-penny stamped sheet of paper.

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" part of the faid commissioners on the Laidreng " .. sonnexe (day of June having begun to put the " faid commission into execution, against the faid " Francis Gibbons, did find, that the faid Francis " Gibbons did, before the date and fuing forth of the " faid commission, become bankrupt within the " intent and meaning of the leveral statutes made, " and now in force, concerning bankrupts, some " or one of them, and did therefore declare the faid " Francis Grobons, bankrupt, accordingly. And we " the faid commissioners do further certify to your " lordship, that Charles Jones, John Partridge, John Leigh, John Merith, James Welch, Charles Dennis, " George Adams, Edward Smith, Robert Bond, Charles " Meriton, George Welp, Jonas Strong, James Lally, " Daniel Goodeer, Charles Church, John Lloyd, Peter " Sainthull, are the only creditors of the faid Fran-" cis Gibbons, who have proved debts under the faid " commission. And we the faid commissioners do " further humbly certify to your lordship, that we " did meet pursuant to notice in the London Gastreetie for that purpole, on man storthe W "day of the faid month of June, for the proof of debts (a) and one ve bas the smooth and day of " the faid month of June, for the choice of af-" fignees (b) of the faid bankrupt's effate and ef-" feets, when (c) no other creditor proved or claimed frany debt under the faid commission, at either of

entieman, together with Champion Brankl, el

(4) "When John James, James Bently, Mary Cambs, &c. proved debts under the faid commission;" if the fast be so.

(b) "When John Partridge, of, &c. and Charles Dennis, of, &c. "were duly chosen assignees of the estate and effects of your petithe anguication to Supebne the commission be fe maneit mi

"debts under the faid commission:" if the fail be fo.

(c) If the certificate te altered as in notes, this word se when " must be " and " to make it fense. s be agrifed as a treble fix penny famped sheet of paper

the faid fittings. Witness our hands this day of Fuly, in the year of

day of July, in the year of our Lord 1768."

Thomas Nugent,

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ony to throt gaint ben areb sal at John Fenshawe, Thomas Life.

Memorandum of the commissioners figning the above cerow have an agipany tificate.

re ad conseiling to the state to your

" BE IT REMEMBERED, that we whose names are hereunto subscribed, being the major part of the commissioners named and authorized, in and by a commission of bankrupt awarded and issued, and now in profecution against Francis Gibbons, of, &c. met the day and year, and at the place abovefaid, and at the instance of all the faid bank-" rupt's creditors under the faid commission, made our certificate, and thereby certified to the right " honourable the lord high chancellor of Great Brixi tain, that we the faid commissioners had declared the faid Francis Gibbons bankrupt, and that the 66 faid Charles Jones, &c. [as before in petition, fol. 507] were the only creditors who hadproved or claimed any debts under the faid commisse sion (a). Witness our hands this " day of July 1768."

Thomas Nugent, Richard Wood, Thomas Life.

(a) If any other proceedings were had, you must set them forth at In vertificates

Affidavit

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(a) Th with a do under the Affidavit of seeing the creditors sign consent at foot of petition to Supersede the commission.

"In the matter of

" Francis Gibbons,

" bankrupt.

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Fidavit

" James Brown of, &c. maketh oath, that he " this deponent did, this ' day of July, 1768. " fee Charles Jones, &c. fign their names to a con-" fent in writing, subscribed to the prayer of a peti-" tion of the faid Francis Gibbons, intended to be " preferred to the right honourable the lord high " chancellor of Great Britain, most humbly pray-"ing, that his lordship would be pleased to order " that the faid commission of bankrupt might be " immediately superseded, and that a writ of fu-" persedeas might forthwith issue for that purpole, " at the expence of the faid Francis Gibbons, or to " that effect. And this deponent further faith, " that the names of the faid Charles Jones, &c. " figned and subscribed to the said consent in wri-" ting, are of the respective proper hand-writing " of the faid Charles Jones. " Sworn, &c. Fames Browne.

## Writ (a) of Supersedeas.

" GEORGE the third, by the grace of God, of " Great Britain, France, and Ireland, king, de-" fender of the faith, and fo forth, To our trufty " and well-beloved Thomas Nugent, John Fenshawe,

(a) This writ of superfedens is engroffed on parchment, and stamped with a double 12d. blue stamp, and also with a double 6d. red stamp, under the bine one. Z

sa Champion Beanfil, refiquites, Richard Wood and MHEREAS ce we being informed that Francis Gibbons of, &c. coluing and exercifing the trade of merchandize, by way of bargaining exchange bartering, chevisance, seeking his trade of living by buying and felling, DID become bankrupt, within the " feveral statutes made against bankrupts, to the intert to defraud and hinder Charles Jones of, &c. and others, his creditors, of their full debts minding the due execution of the leveral flarutes made against hankrupts, Did, by our commission under the great leal of Great Britain, bearing date at Westminster the year of our reign, name, affign, " in the appoint, constitute, and ordain you our special " commissioners, THEREBY giving, &c. [bere recite the original commission, in fol. 309, to Di-" ligence and Effect," then add] " Now for a fmuch " as the faid Francis Gibbons the bankrupt, by his "humble petition, exhibited to our lord high chancellor of Great Britain, for the reasons there. " in contained, prayed that the faid commission " might be superseded whereunto we graciously " inclining, Do, by these presents, will and command you, and every of you, to stay and fur-" cease all further proceedings upon the said com-" mission, and that you superfede the same accord-" ingly, as our special trust is in you reposed. " WITNESS ourself at Westminster, the year of our day of in the " our reign."

7. Yorke.

When this writ is obtained, the commissioners must be served therewith, by delivering to each of them

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oners ch of them them a copy, and at the same time shewing them respectively, the original writ under seal, and then the proceedings are at an end pout it is usual to give notice the roof in the Gozatte, by an advertise with following effect, nine grad to vew your and the following effect, nine grad to you you will be not gravely an individual of the control of the process of the same and same a

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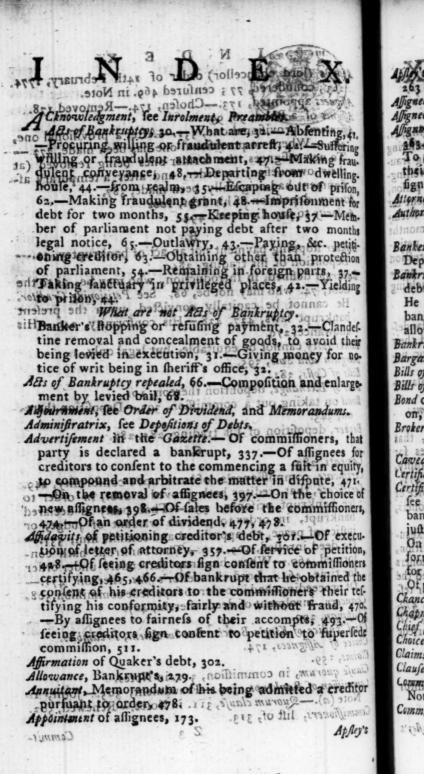
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